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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

and

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioners,

v.

THE UNITED STATES OF AMERICA

and

THE INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Should the Interstate Commerce Commission, faced with the largest transportation merger in its history, and ordered by statute to maximize competition, consider imposing merger conditions which introduce rail competition into vital, but closed, rail markets as the public-interest price for the private benefits of the merger?

2. Did the Interstate Commerce Commission approve a rail merger where only three of six commissioners voted their unqualified approval of the transactions?

3. May a court of appeals, faced with a public-interest determination in a complex administrative case, abandon the substantial evidence standard of review?

LIST OF PARTIES

Eight petitions for review of an order of the Interstate Commerce Commission were consolidated in the Court of Appeals. The parties* involved in each of these petitions are as follows:

1. No. 82-2253: SP, Petitioners; DRGW, ATSF, UP and CNW, Intervenors.
2. No. 82-2323: DRGW, Petitioner; CNW, Intervenor.
3. No. 82-2342: Edward K. Wheeler, Petitioner; CNW, Intervenor.
4. No. 82-2370: KCS, Petitioner; CNW, UP, DRGW, ATSF, and SP, Intervenors.
5. No. 82-2418: Brotherhood of Maintenance of Way Employes, Brotherhood of Railway Signalmen, Brotherhood of Railway & Airline Clerks, Inter-

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* The following abbreviations will be used for participants in the proceedings below and other entities:

ATSF	Atchison, Topeka & Santa Fe Railroad Company
CNW	Chicago & North Western Transportation Company
Conrail	Consolidated Rail Corporation
DRGW	Denver & Rio Grande Western Railroad Company
KCS	The Kansas City Southern Railway Company and its wholly owned subsidiary, Louisiana & Arkansas Railway Company
MP	Missouri Pacific Corporation and Missouri Pacific Railroad Company
NS	Norfolk Southern Corporation
SP	Southern Pacific Transportation Company and St. Louis Southwestern Railway Company
UPC	Union Pacific Corporation, and its subsidiaries, Pacific Rail System, Inc. and Union Pacific Railroad Company
UP	UPC and other merger parties, MP and WP
WP	Western Pacific Railroad Company

national Association of Machinists & Aerospace Workers, and United Transportation Union, Petitioners; UP and CNW, Intervenors.

6. Nos. 82-2371 and 82-2430: ATSF, Petitioner; UP and DRGW, Intervenors. (CNW also intervened in No. 82-2371).

7. No. 82-2479: American Train Dispatchers Association, Petitioner; CNW, Intervenor.

The Interstate Commerce Commission and the United States of America were respondents in each of these separately-docketed petitions for review.

LIST OF PARENTS, SUBSIDIARIES AND AFFILIATES

Kansas City Southern Industries, Inc. is the parent corporation of petitioner The Kansas City Southern Railway Company. The parent corporation of Louisiana & Arkansas Railway Company is The Kansas City Southern Railway Company.

Joplin Union Depot Company and Kansas City Terminal Railway Company are subsidiaries (other than wholly owned subsidiaries) of petitioner The Kansas City Southern Railway Company. Louisiana & Arkansas Railway Company has no subsidiaries that are not wholly owned by it.

The following are The Kansas City Southern Railway Company's affiliates:

Pioneer Western Corporation
Western Reserve Life Assurance Company
PW Securities, Inc.
Pioneer Western Properties Inc.
Pioneer Western Energy Corporation
Derby Oil & Gas
Derby Petroleum
D & H Well Service
Twin Hills Supply
Janus Capital Corporation
Argus Computing
Quinflex Joint Venture
Investors Acceptance Corp.
DST Systems, Inc.
DST Securities, Inc.
DST Clearing, Inc.
Wall Street Clearing
National Realty Securities, Inc.
Somerset Capital Management, Inc.
Support Resources, Inc.
Boston Financial Data Services, Inc.

Shareowner Investor Services Corporation
Investors Fiduciary Trust Company
TPA Systems, Inc.
DST Computer Services S.A.
Two Heritage Drive Realty Associates
DST Realty, Inc.
Winchester Venture
Downtown Investors
LDX Group, Inc.
Telecom Engineering
LDX Network
Mid-American Cellular Systems, Inc.
Lexitel Corporation
Direct Broadcast Satellite Corporation
International Satellite Corporation
American-Coleman Company
American-Coleman International Corporation
Rycom Instruments, Inc.
Lonestar-Kansas City Concrete Tie Company
Brighton Pharmaceuticals
L.M. Johnson Company
Martec Pharmaceutical Inc.
Martec Pharmaceutical Joint Venture
Bellview Pharmaceutical
Rockhill Pharmaceutical
Olive Pharmaceutical
Southern Development Company
Rice-Garden Corporation
Port Arthur Bulk Marine Terminal Company
Northern Farms, Inc.
Southern Group, Inc.
Carland, Inc.
Trans-Serve, Inc.
Southern Leasing
Pabtex, Inc.
Tolmak, Inc.
Landa Motor Lines
Louisiana, Arkansas & Texas Transportation Company

In addition to those listed in the foregoing paragraph, Louisiana & Arkansas Railway Company has the following affiliates:

Fort Smith and Van Buren Railway Company
Joplin Union Depot Company
The Kansas and Missouri Railway and Terminal Company
Kansas City Terminal Railway Company
The Maywood and Sugar Creek Railway Company
Kansas City Southern Transport Company, Inc.
The Arkansas Western Railway Company

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THE UNITED STATES OF AMERICA

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THE INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner KCS respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on May 22, 1984.

OPINIONS BELOW

The Interstate Commerce Commission's opinion (App. 39a-615a) was served on October 20, 1982 and is published at 366 I.C.C. 459-819. The decision of the United States Court of Appeals for the District of Columbia Circuit (App. 1a-38a) is reported at 736 F.2d 708 (D.C. Cir. 1984).

JURISDICTION

The judgment of the Court of Appeals was entered on May 22, 1984. (App. 616a-620a). A petition for rehearing and suggestion for rehearing *en banc*, filed on June 25, 1984 pursuant to D.C. Cir. R. 14(a)(1) by petitioners The Kansas City Southern Railway Company and Louisiana & Arkansas Railway Company, was denied on July 20, 1984. (App. 626a-629a).[1] The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1), 2321(a), 2342(5) and 2350(a) (1982).

CONSTITUTIONAL PROVISION, STATUTES AND REGULATION INVOLVED

The following constitutional provision, statutes and regulation involved in this case appear in the Appendix:

I. The Due Process Clause, U.S. Const. amend. V (App. 630a).

II. The Administrative Procedure Act, 5 U.S.C. § 706 (1982) (App. 630a-631a).

III. The Interstate Commerce Act, 49 U.S.C. § 10101a (1982), the new Rail Transportation Policy added by the Staggers Rail Act of 1980, Pub. L. No. 96-448, § 101(a), 94 Stat. 1897 (App. 631a-632a).

IV. The Interstate Commerce Act, 49 U.S.C. § 10701a (1982), added by the Staggers Rail Act of 1980, Pub. L. No. 96-448, § 201(a), 94 Stat. 1898 (App. 633a-635a).

V. The Interstate Commerce Act, 49 U.S.C. § 10709 (1982), as amended by the Staggers Rail Act of

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[1] The American Train Dispatchers Association filed a petition for rehearing and suggestion for rehearing *en banc* on July 6, 1984. Edward K. Wheeler filed a petition for rehearing on June 11, 1984. All of these petitions were denied on July 20, 1984. (App. 621a-625a).

1980, Pub. L. No. 96-448, § 202, 95 Stat. 1900 (App. 635a-638a).

VI. The Interstate Commerce Act, 49 U.S.C. § 11343 (Supp. IV 1980) prior to the amendment of this section on September 20, 1982 by Pub. L. No. 97-261, § 21(b), 96 Stat. 1122[2] (App. 639a-641a).

VII. The Interstate Commerce Act, 49 U.S.C. § 11344 (Supp. IV 1980), as amended by the Staggers Rail Act of 1980, Pub. L. No. 96-448, §§ 228(a)-(c), 94 Stat. 1931, but prior to its amendment on September 20, 1982 by Pub. L. No. 97-261, §§ 21 (f) and (g), 96 Stat. 1123[3] (App. 641a-644a).

VIII. General Policy Statement For Merger Or Control Of At Least Two Class I Railroads, 49 C.F.R. § 1180.1 (1983) (App. 644a-648a).[4]

STATEMENT OF THE CASE

This petition seeks review of the largest transportation merger in this nation's history. On September 15, 1980, UPC filed with the Interstate Commerce Commission pursuant to 49 U.S.C. § 11343 (Supp. IV 1980) applications seeking control of MP and WP and their rail carrier subsidiaries. Prior to merger, UPC was a transcontinental railroad which operated over right-of-way primarily in the "central corridor" of the United States west of Kansas City, Missouri. After merger, UPC controlled a rail system connecting the Pacific Northwest and northern and southern California with the Midwest, Mississippi River ports, Gulf Coast ports

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[2] The amendment made by Pub. L. No. 97-261 became effective 60 days after September 20, 1982, *see* Pub. L. No. 97-261, § 31, *after* the decision of the Commission was rendered in this case.

[3] *See* note 2, *supra*.

[4] This section was originally numbered 49 C.F.R. § 1111.1. The redesignation occurred on November 1, 1982. 47 Fed. Reg. 49,592 (1982).

and Texas-Mexico border-crossing points, thereby obtaining access to nearly every gateway and port west of the Mississippi. 366 I.C.C. at 474 (App. 64a).

In light of the concentration of market power involved, numerous public and private parties opposed the consolidation and twenty-nine competing rail carriers filed applications seeking traffic-protective conditions to ameliorate the effects of the merger on them. *Id.* at 472 (App. 61a). KCS sought certain public-interest conditions consisting of trackage rights over MP lines in Texas, in Louisiana, and between Texas and St. Louis, an area affected by the merger.[5] *Id.* at 593 (App. 240a). KCS' proposed public-interest conditions, in contrast to the traffic-protective conditions proposed by other railroads, were designed to introduce competition into economically vital MP rail markets under monopolistic or duopolistic control.[6]

The Commission conducted hearings from March 3, 1981 to January 6, 1982. *Id.* at 472 (App. 61a). The government parties representing the public interest split on the questions of whether, and on what basis, the UPC-MP-WP merger should be approved. The Commission's Office of Special Counsel flatly opposed the merger

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[5] KCS also sought certain limited traffic protection which was denied by the Commission. 366 I.C.C. at 593-94, 597 (App. 240a, 245a). Such denial was not appealed and is not at issue in this Petition.

[6] KCS introduced evidence at hearing which showed: (1) that the East Texas and Louisiana Gulf area was the fastest-growing industrial region in the nation; (2) that, because of the commodities involved in the local economies (chemicals, soda ash, grain, etc.), shippers in the Gulf area were heavily dependent on rail transportation; and (3) that MP enjoyed monopolistic or duopolistic control in rail markets in which KCS sought trackage rights. This evidence of the need for, and the public benefits obtainable from, KCS' proposals was uncontroverted at hearing. Moreover, shippers in the region overwhelmingly supported KCS' proposals.

on the ground that no conditions could remedy its anticompetitive consequences. *Id.* at 475 (App. 66a). The Department of Transportation deemed the merger acceptable only if a number of traffic-protective conditions were imposed to offset the extensive market power of the merged system. Brief of Department of Transportation to the Commission at 3-5 (App. 650a-652a). The Department of Justice, though not actively supporting the merger, declined to oppose it if anticompetitive effects in the central corridor were ameliorated by granting DRGW trackage rights between Pueblo, Colorado and Kansas City, Missouri. *Id.* at 475 (App. 65a-66a).[7]

On September 24, 1982, the Commission voted on the UPC-MP-WP consolidation. The Commission unanimously concluded that the merger could not be approved in the form proposed by UP. Three members of the Commission voted to approve the merger if conditioned as specified in a draft report; two members voted to approve the merger subject to the imposition of additional conditions designed to offset competitive harms; one Commissioner opposed the merger. *See* Commission Ballots (App. 656a-670a). The Commission never held another formal proceeding, but on October 20, 1982, issued a report on the basis recommended in the draft report. In addition to the three commissioners who had voted approval of the draft report, the two commissioners who had withheld approval on September 24, 1982 were shown on October 20, 1982 as "concurring" in the result. 366 I.C.C. at 645-47, 649-50 (App. 315a-318a, 321a-323a).

Assuming, despite the foregoing, that the October 20, 1982 report represents the views of a majority of the Commission, the Commission found that the merger would yield public benefits of some $47 million annually

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[7] Before the Court of Appeals, the Department of Justice joined the Commission in arguing to uphold the decision of the Commission. The Office of Special Counsel and Department of Transportation did not participate in the appeal.

because of "service improvements, cost reductions resulting from increased operating efficiencies, enhanced competition, and a stronger financial position for the merged system". 366 I.C.C. at 489 (App. 86a). The Commission also found that the merger would result in a "significant adverse competitive effect" on rail transportation of transcontinental traffic in the central corridor and Midwest traffic, especially that moving from Omaha to the Gulf. *Id.* at 533 (App. 149a). The Commission granted certain trackage rights to DRGW, SP and Missouri-Kansas-Texas Railroad Company in order to "ameliorate" these anticompetitive effects. *Id.* at 568, 578, 580 (App. 204a-205a, 216a, 220a).

The Commission refused even to consider the public-interest conditions requested by KCS. The Commission treated KCS' evidence on the need to introduce rail competition into an area affected by the merger and the public benefits to be gained thereby as "irrelevant". *Id.* at 596 (App. 243a). According to the Commission, conditions should not, as a matter of policy, be imposed on a merger except to restore pre-existing competition lost as a result of merger. *Id.* at 562-65, 595-96 (App. 193a-198a, 241a-243a).

KCS' petition for review pursuant to 28 U.S.C. § 2342 (5) (1982), consolidated with similar petitions by other parties, was heard by the Court of Appeals for the District of Columbia.[8] KCS challenged the order of the Commission on three principal grounds. KCS contended that the Commission had disregarded the requirements of the Staggers Rail Act of 1980 when it refused even

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[8] Petitioning railroads, including KCS, sought to stay the Commission's decision pending appeal. The Court of Appeals granted only a temporary stay on December 9, 1982. *See* Slip Op. at 12, n.5, 736 F.2d at 714-15, n.5 (App. 12a). On December 22, 1982, this Court (by Burger, C.J., sitting as Circuit Justice) denied a further stay. Southern Pacific Transp. Co. v. ICC, No. A-544; Atchison, T. & S.F. Ry. v. ICC, No. A-545; Kansas City Southern Ry. v. ICC, No. A-546.

to consider the public-interest conditions proposed by KCS. KCS further argued that, because three of the six Commissioners did not vote to approve the merger in the form described in the report, the UPC-MP-WP applications were effectively denied. Finally, KCS argued that the Commission's finding that the "public will derive benefits amounting to $47 million annually as a result of consolidation", 366 I.C.C. at 489 (App. 86a), was not supported by substantial evidence or by its subsidiary findings. Specifically, KCS showed that, because of numerous arithmetic and typographical errors, subsidiary findings based on superseded evidence, and repeated failures by the Commission to incorporate into its calculations certain of its own subsidiary findings concerning public costs, the merger would result not in net benefits to the public, but in millions of dollars of net public costs annually.

The Court of Appeals affirmed the Commission on these issues.[9] Specifically the Court of Appeals adopted the Commission's interpretation of the application of the Staggers Rail Act to public-interest conditions. Without any significant analysis of the Act, its purpose or its relevant legislative history, the Court of Appeals held that the Commission may refuse to consider conditions that enhance rail competition in economically vital areas affected by the merger. Slip. Op. at 28-29, 736 F.2d at 722 (App. 28a-29a).

The Court of Appeals did not address the absence of a majority vote in favor of the transaction described in the report. Further, the Court of Appeals made no examination of any of the errors in subsidiary findings identified by KCS, much less an analysis of the relationship between such subsidiary findings and the

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[9] The Court of Appeals remanded for further proceedings in connection with a traffic-protective condition sought by DRGW. Slip Op. at 32-34, 38, 736 F.2d at 724-25, 727 (App. 32a-33a, 38a).

Commission's ultimate $47 million public-benefit finding. Instead, characterizing KCS' position as a mere dispute over "costing methodologies", Slip Op. at 23, 736 F.2d at 720 (App. 23a), the Court of Appeals employed, without citation of authority, an "independent judgment" standard to define its scope of review. On the sole ground that the Commission had not adopted its cost and benefit figures "wholesale" from UP, the Court of Appeals concluded that the Commission had exercised its "independent judgment", and held "[t]hat must be enough for us". Slip Op. at 24, 736 F.2d at 720 (App. 24a).[10]

REASONS FOR GRANTING THE WRIT

The new Rail Transportation Policy, 49 U.S.C. § 10101a (1982), added by the Staggers Rail Act of 1980, requires the Commission to restructure the nation's rail system to promote competition. By refusing to even consider public-interest conditions designed to increase competition over pre-merger levels in economically vital rail markets, the Commission has abdicated the role established for it by the Staggers Rail Act. The Commission's decision not to consider procompetitive public-interest conditions will result in a rail market frozen at the level of competition existing in the rail industry in 1980. Because of the importance of this new legislative scheme on the rail industry, and the impact of the Commission's refusal to use its conditioning power to enhance competition, this Court should grant certiorari.

Since the Commission did not approve the transaction described in the report by majority vote, the Court of Appeals has affirmed a decision which did not accord with traditional principles of due process and administrative procedure. The Commission's action

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[10] KCS' petition for rehearing was denied without opinion (App. 626a-629a).

circumvents the public-interest analysis of each of its members. Sanctioning final administrative action by less than a majority vote warrants review by this Court.

By focusing merely on the purported exercise of "independent judgment" by the agency, the Court of Appeals has announced a far more deferential standard of review than any previously approved by this Court. Because this novel "independent judgment" standard represents such a departure by the Court of Appeals from administrative jurisprudence and has such serious consequences in this case and in other public-interest cases, this Court should grant certiorari.

I. THE COMMISSION'S REFUSAL TO CONSIDER PROCOMPETITIVE PUBLIC-INTEREST CONDITIONS FRUSTRATES THE CONGRESSIONAL POLICY UNDERLYING THE STAGGERS RAIL ACT OF 1980.

From 1887 to 1980, railroads in the United States were closely regulated by the Commission. *See* H.R. Rep. No. 1035, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Ad. News 3978, 4025-38. The Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895 (codified as amended in various sections of 49 U.S.C.), marked a radical change of policy. In place of rigid Commission regulation, the Staggers Rail Act substituted marketplace competition, wherever possible, to control rates and services in the railroad industry.[11]

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[11] Although ruling that the Staggers Rail Act technically did not apply to the UPC-MP-WP merger, the Commission acknowledged that it was bound to apply the new national Rail Transportation Policy, 49 U.S.C. § 10101a, because of the Commission's duty to account for future effects. 366 I.C.C. at 483-85 (App. 78a-80a). The Court of Appeals noted, without further comment, that the Commission "elected to adhere to . . . [the Act's] policies". Slip Op. at 14, 736 F.2d at 715-16 (App. 14a). The Commission was bound to implement the national Rail Transportation Policy in any event, because § 10101a controls these proceedings as a matter of law. *Compare* the draft savings clause, H.R. 7235, § 802, 126

To accomplish this objective, Congress articulated a wholly new Rail Transportation Policy, 49 U.S.C. § 10101a. Section 10101a states that "it is the policy of the United States Government":

> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
>
> (2) to minimize the need for Federal regulatory control over the rail transportation system[;]
> . . . .
>
> (4) to ensure the development . . . of a sound rail transportation system with effective competition among rail carriers[;]
> . . . .
>
> (7) to reduce regulatory barriers to entry into . . . the industry;
> . . . .
>
> (13) . . . to avoid undue concentrations of market power . . . .

This new Congressional statement of rail policy, like the National Transportation Policy which preceded it, "is the yardstick by which the correctness of the Commission's actions will be measured." *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 87-88 (1957). *See also McLean Trucking Co. v. United States*, 321 U.S. 67, 79-80 (1944).

The Rail Transportation Policy enacted in the Staggers Rail Act represents Congress' third major attempt

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Cong. Rec. 24,878 (1980) (covering any "application, action or proceeding") *with* the savings clause enacted, Pub. L. No. 96-448, § 228(e) (covering only "applications"). The UPC-MP-WP merger applications were filed just two weeks before the Act became effective on October 1, 1980. *See* Pub. L. No. 96-448, § 710. The savings clause was designed to protect these just-completed applications from abatement, not to insulate the merger "proceedings" from "the policy of the United States". 49 U.S.C. § 10101a.

to rationalize the national rail system. In 1920, Congress chose central planning as the means for restructuring the national rail system, and directed the Commission to develop a master merger plan. *St. Joe Paper Co. v. Atlantic Coast Line Railroad Co.*, 347 U.S. 298, 315-19 (1954) (Appendix of Frankfurter, J.). In 1940, because central planning proved ineffective, Congress substituted private merger initiative for Commission planning. *Id.* at 319. With the passage of the Staggers Rail Act in 1980, Congress has determined to rely on competition to promote rail system restructuring through privately-initiated mergers.[12]

This new policy imposes a new burden on the Commission in protecting the public interest in merger proceedings. Before 1980, the public was protected from market power abuses made possible by inadequate competition in vital rail markets by close Commission regulation of rates and services. Consequently, when the Commission restructured the national rail system through privately-initiated merger proposals, the preservation of pre-existing competition was an important, but not an essential, regulatory objective.

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[12] The rail merger activity which Congress sought to promote has in fact occurred. In addition to the UPC-MP-WP merger, the Commission has approved the merger of NS (formerly the Norfolk and Western Railway Company and the Southern Railway Company) since the Staggers Rail Act took effect. Norfolk Southern Corporation—Control—Norfolk and Western Railway Company and Southern Railway Company, 366 I.C.C. 171 (1982). Currently pending before the Commission are the merger applications of ATSF and SP. 49 Fed. Reg. 16,881 (1984). SP and ATSF are the only transcontinental railroads operating west of the Mississippi in the southern tier. Further, the Department of Transportation is considering the bid of NS, one of the three largest eastern railroads with transcontinental connections, to buy Conrail, another of the three largest eastern railroads with transcontinental connections. Feaver, *Conrail Bidders Narrowed to 3*, The Washington Post, September 12, 1984, at D8. *See also* 49 Fed. Reg. 19,914 (1984).

Under the Staggers Rail Act, however, rates and services are to be regulated by the marketplace, and effective competition among rail carriers has become a mandatory regulatory objective. Mere preservation of existing competition, therefore, is no longer adequate. In restructuring the national rail system through privately-initiated mergers, exercise of the Commission's conditioning power to increase competition has become the essential public-interest variable.

The Commission's action in this case frustrates the "policy of the United States". 49 U.S.C. § 10101a. Although acknowledging that KCS' proposed public-interest conditions were "aimed . . . at increasing current levels of competition", 366 I.C.C. at 595 (App. 242a), the Commission nevertheless ruled KCS' proposals "irrelevant", *id.* at 596 (App. 243a), on the ground that KCS had not met a threshold test of showing that its public-interest conditions were responsive to reductions in competition caused by the merger.[13]

A refusal even to consider "increasing . . . competition", *id.* at 595 (App. 242a), cannot be reconciled with the Congressional injunction that competition is to set rail rates "to the maximum extent possible". 49 U.S.C. § 10101a(1). Furthermore, the Commission's refusal even to consider procompetitive public-interest conditions

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[13] The restoration-of-competition test proposed by the Commission for public-interest conditions is the same test as that applied by the Commission to traffic-protective conditions. *See* 49 C.F.R. § 1180.1(d)(1) (1983) (App. 647a). Traffic-protective conditions differ from public-interest conditions, however. Traffic-protective conditions are sought by petitioning railroads to regain traffic that they would otherwise lose as a result of a merger. Public-interest conditions, in contrast, are designed to add new traffic to a petitioning railroad's lines because the public's need for competition demands that result. (For example, KCS requested rights over MP's line along the west bank of the Mississippi from New Orleans because that service area is economically vital, is highly dependent on rail transportation, and is served only by MP).

flouts "the policy of the United States . . . to minimize the need for Federal regulatory control over the rail transportation system". 49 U.S.C. § 10101a(2). Pursuant to the marketplace-oriented approach of the new Staggers Rail Act, railroads may now "establish any rate for transportation or other service" without the Commission's regulatory approval. 49 U.S.C. § 10701a (a) (1982). But, if "a rail carrier has market dominance over the transportation to which a particular rate applies", the Commission must, as in the days prior to the Staggers Rail Act, determine whether the rate is "reasonable". 49 U.S.C. § 10701a(b)(1). The Act defines "market dominance" as "an absence of effective competition". 49 U.S.C. § 10709(a) (1982). Thus, far from "maxim[izing]" competition and "minimiz[ing]" regulatory control, 49 U.S.C. §§ 10101a(1), (2), the Commission's refusal to consider public-interest conditions designed to eliminate market dominance perpetuates the federal regulation the Staggers Rail Act was fashioned to replace.

Nor does the Commission's position meet the requirements of 49 U.S.C. §§ 10101a(4), (7) and (13). The Commission is "to ensure the development . . . of a sound rail transportation system with effective competition among rail carriers". 49 U.S.C. § 10101a(4). If the Commission refuses to consider public-interest conditions of the sort KCS proposed, "effective competition" is an impossible goal in markets in which it does not presently exist. Railroads will never voluntarily surrender access to markets they control except to gain a more desirable objective. Indeed, because the rail industry enjoys an almost total barrier to entry of new competition,[14] conditioning approval of a merger on track-

[14] The Department of Justice has recognized that obtaining "trackage rights is the only feasible method of entry in developed markets in the rail industry". Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Railway Co., 360 I.C.C. 784, 919 (1980). *See also* 49 C.F.R. § 1180.1(c)(1) (1983) (new construction is not a feasible means of entry).

age rights is the *only* practical means for the Commission to achieve effective competition in closed markets. Furthermore, instead of "reducing regulatory barriers to entry", 49 U.S.C. § 10101a(7), the Commission's policy on public-interest conditions adds one more such barrier. Finally, in preserving MP's monopolistic or duopolistic dominance in rail markets identified by KCS, the Commission's rule on public-interest conditions necessarily preserves, contrary to law, "undue concentrations of market power". 49 U.S.C. § 10101a(13).

As the sole reason for its failure to consider KCS' public-interest conditions,[15] the Commission cited Congressional policy in favor of approving privately-initiated transactions that do not harm the public. The Commission feared that this policy would be contravened if the Commission were to use merger proceedings as "vehicles for rail system restructuring" in view of the "disincentive for the [merger] parties to consummate the transaction" that might ensue. 366 I.C.C. at 564-65 (App. 196a-198a). The Court of Appeals summarily affirmed the Commission's articulation of Congressional policy, albeit with greater flair for the dramatic: "[T]he Commission is not required to act as a roving ombudsman restructuring railroads on its own in order to satisfy an individual carrier's notion of what effective competition may require." Slip Op. at 29, 736 F.2d at 722 (App. 29a).

The Commission's rationale does not withstand analysis. KCS does not suggest that procompetitive public-interest conditions are mandatory, or should be imposed regardless of whether they drain away the private benefits of a merger.[16] Moreover, the Commission's argument

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[15] Although the Commission refers to "[s]everal considerations", 366 I.C.C. at 564 (App. 196a), each of the considerations appears to be a restatement of the same concern.

[16] The constituent railroads of the merged system enjoyed operating revenues in 1979 (the study year) totalling $3.3 billion. 366 I.C.C. at 808-10 (App. 604a-606a). KCS' conditions, if approved in

that potential merger partners will forego merger proposals out of fear of being saddled with public-interest conditions cannot be reconciled with the Congressional policy of developing a "system with effective competition among rail carriers", 49 U.S.C. § 10101a(4), or with the Commission's own history.[17]

The Court of Appeals suggests that the Commission is not a "roving ombudsman". Slip Op. at 29, 736 F.2d at 722 (App. 29a). To the contrary, the Commission's conditioning power requires it to be an "ombudsman" in railroad merger proceedings. The Commission, empowered to confer the benefits of antitrust immunity and increased market power on private petitioners, is by law the appointed protector of the "public interest". 49 U.S.C. § 11344(c) (Supp. IV 1980). To be sure, the Commission, as an administrative agency, may have discretion to define how far it will rove. But, as the central representative of the public interest, rove it must.

The national Rail Transportation Policy, 49 U.S.C. § 10101a, controls the Commission's administrative discretion. The Commission must exercise its statutorily unqualified conditioning power, *see* 49 U.S.C. § 11344(c) (Supp. IV 1980),[18] to effectuate "the policy of the United

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their entirety, would have reduced such revenues by approximately $100 million. 366 I.C.C. at 701 (App. 413a).

[17] Prior to the Staggers Rail Act, the Commission frequently imposed other conditions having little to do with restoring competition lost as a result of a merger. *See, e.g.*, Missouri-Kansas-Texas R.R. v. United States, 632 F.2d 392, 400 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981), and cases cited; CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc., 363 I.C.C. 518, 576-80 (1980); Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Railway Co., 360 I.C.C. 784, 950-52 (1980).

[18] The Commission does not assert that it lacks power to impose public-interest conditions. Acknowledging its "broad authority to impose conditions", it holds only that *its* policy articulated above reflects the preferred interpretation of the statutory policy controlling exercise of the conditioning power. 366 I.C.C. at 562, 563 (App. 193a, 194a).

States". *See Schaffer*, 355 U.S. at 87-88. "[T]he Interstate Commerce Commission must place, to the greatest extent possible, reliance on competitive market forces in its regulation of the national railroad system". 26 Cong. Rec. 7,262 (1980) (remarks of Sen. Kassebaum, one of two floor managers of the bill in the Senate).

This case is not a matter of parochial concern to KCS and shippers in the Texas and Louisiana Gulf area. It sets the precedent for public-interest conditions in all future railroad mergers governed by the Staggers Rail Act.[19] Conditions and the circumstances in which they are imposed are especially important in light of the virtually absolute barrier to entry in rail transportation. Each railroad merger in which procompetitive public-interest conditions are foregone represents a lost opportunity in a world of diminishing opportunities.[20] The proper weight to be given the procompetitive policies underlying the Staggers Rail Act is an important federal question which has not been, but should be, decided by this Court. Accordingly, the petition for certiorari should be granted.

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[19] The Commission concedes that, apart from this case, it has not addressed the issue of public-interest conditions. After discussing the regulatory history of the standards applicable to traffic-protective conditions, including the Commission's statement of policy, the Commission acknowledges that, "[o]ur criteria for imposing conditions to protect the public have not been set forth in a similar comprehensive fashion . . . ." 366 I.C.C. at 562 (App. 194a). Thus, the Commission's position on public-interest conditions in this case is no less than rule making by adjudication, a procedure which, though not impermissible, requires scrutiny on review, especially in light of the major impact of this new rule on future proceedings. *See, e.g.*, NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764-66 (1969).

[20] Recent merger activity has been heavy. *See* note 12, *supra*. *See also* the remarks of Vice Chairman Gilliam that the UPC-MP-WP merger will result in additional rail mergers. 366 I.C.C. at 647 (App. 318a-319a).

II. TRADITIONAL PRINCIPLES OF DUE PROCESS AND ADMINISTRATIVE PROCEDURE HAVE BEEN VIOLATED IN THIS CASE.

A. The Court of Appeals Upheld a Merger Not Approved By A Majority of Commissioners.

Fundamental to institutional action by a regulatory agency is majority rule. In this case, a majority of commissioners did not vote to approve the UPC-MP-WP transaction described in the published report. By upholding the Commission's "approval" under these circumstances, the Court of Appeals ignored traditional principles of due process and administrative procedure and violated the Administrative Procedure Act (APA), 5 U.S.C. § 706 (1982), which requires a reviewing court to "hold unlawful and set aside agency action . . . found to be . . . not in accordance with law . . . [or] in excess of statutory . . . authority, or limitations, or short of statutory rights." To the contrary, the Court of Appeals has allowed the Commission to ignore the critical public-interest determinations of individual commissioners.

Under 49 U.S.C. § 11344(c), the Commission is to authorize a railroad consolidation found to be "consistent with the public interest". If the proposed transaction does not meet the public-interest criterion, the Commission may authorize a modified transaction which would be in the public interest. *Id.* By definition, a modified transaction is different from the one proposed by the merger applicants, and from any other modified transaction which might have been considered and rejected.

The Commission's last official action on the issue of whether to approve the UPC-MP-WP merger occurred on September 24, 1982 when the last commissioners cast their written ballot on a draft opinion. The draft opinion proposed the same transaction described in the report ultimately published at 366 I.C.C. 458. Of the six ballots cast by September 24, only three—less than the requisite

majority—approved the transaction described in the published report. Chairman Taylor and Commissioner Simmons voted "to approve the draft decision subject to" the imposition of additional trackage rights to remedy anticompetitive consequences of the merger that had not been adequately addressed in the draft decision. (App. 656a, 657a-659a). Commissioner Andre voted to disapprove the merger. (App. 660a).

The Commission neither convened to discuss the UPC-MP-WP merger nor cast further written ballots after September 24, 1984.[21] Yet the votes of Commissioners Taylor and Simmons to approve a transaction entirely different from that described in the draft opinion were, without further official action by the Commission, transmuted into "concurrences" by October 1, 1982. (App. 671a-677a). *See also* 366 I.C.C. at 645-47, 649-50 (App. 315a-318a, 321a-323a).

Such a characterization of Commissioners Taylor's and Simmons' votes ignores the fundamental difference between mergers subject to different conditions. In a vote on whether a given transaction is "consistent with the public interest", 49 U.S.C. § 11344(c), a ballot cast in favor of requiring a modified transaction is not a concurrence, but is instead a statement of what additional conditions the voter believes necessary to make the transaction acceptable to the public interest.[22]

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[21] Significantly, the published report lists the date of decision as September 24, 1982, the date the last written ballot was received. 366 I.C.C. at 462 (App. 44a).

[22] Vice Chairman Gilliam's statement that he would rather not have adjudicated the fairness of the transaction to WP minority shareholders, 366 I.C.C. at 648-49 (App. 320a-321a), is a true "concurrence". His decision on this issue, like a concurring opinion by a member of an appellate bench, has significance only as an interpretation of law. If Vice Chairman Gilliam's reasoning on the shareholder issue had been adopted, no aspect of the transaction approved would have been changed.

Under § 11344(c), a merger can be in the public interest only if, *as conditioned*, it receives a majority vote. The absurdity of a process where approval of the merger is divorced from the imposition of conditions is that it would result in the unconditioned approval of a merger, where every single commissioner agreed that conditions were required in the public interest, but no particular condition received a majority vote.

The subsequent filing of "concurring" opinions by Commissioners Taylor and Simmons on October 1, 1982 is irrelevant. Had the Commission conducted another formal vote, it is likely—or certainly possible—that one or more of the conditions desired by these commissioners would have been imposed to secure the necessary fourth vote. As matters now stand, the public can never know whether the concerns of the two "concurring" commissioners were ever addressed or allayed, or whether these commissioners mistakenly believed that they were required to concur once a merger in some form received the votes of five commissioners. The Commission's unorthodox vote-tallying method simply failed to take account of the individual commissioners' assessment of the public interest.

The Commission's voting procedure presents an important federal question which has not been, but should be, reviewed by this Court.

B. In Conflict With Decisions Of This Court, The Court Of Appeals Has Announced A Novel "Independent Judgment" Standard Of Review For Administrative Action Far More Deferential Than The Statutory Substantial Evidence Standard.

This Court has held federal courts to the scope of review dictated by the APA, 5 U.S.C. § 706. Thus, in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971), the Court explained that § 706 requires a "substantial" "searching and careful" inquiry and "a thorough, probing, in-depth review".

See also Bowman Transportation, Inc. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974). The Court has further emphasized that effective judicial review is the *only* way to ensure that, despite the deference ordinarily due agency expertise, the administrative process operates properly. Otherwise, as the Court pointed out in *Baltimore & Ohio R. Co. v. Aberdeen & Rockfish R. Co.*, 393 U.S. 87, 92 (1968):

> The requirement for administrative decisions based on substantial evidence and reasoned findings—which alone make effective judicial review possible—would become lost in the haze of so-called expertise. Administrative expertise would then be on its way to becoming " 'a monster which rules with no practical limits on its discretion' ". Burlington Truck Lines v. United States, 371 U.S. 156, 167 [(1962)].

The Court of Appeals has misapprehended and misapplied these precedents. Without citation of authority, the Court of Appeals has announced an entirely new standard for judicial review of administrative decision-making—the "independent judgment" test. With this novel test, the Court of Appeals has abandoned the "searching and careful" examination required by *Overton Park*, 401 U.S. at 416,[23] in favor of the "judicial inertia" condemned in *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965).

KCS challenged the UPC-MP-WP merger as failing to satisfy the requirement of 49 U.S.C. § 11344(c) that the merger produce a net public benefit. The Commission, however, made the ultimate finding that the merger

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[23] The enthusiasm of the government parties before the Commission for the merger was less than unalloyed. *See* discussion, *supra*, pp. 4-5. Indeed, three of the six Commissioners thought the merger either insufficiently conditioned or wholly contrary to the public interest. In such circumstances, it is especially important for a reviewing court to assure itself that the claimed public benefits are really there.

would produce $47 million of public benefits annually. 366 I.C.C. at 489 (App. 86a). KCS renewed its challenge in the Court of Appeals, contending that the $47 million figure was contrary to the Commission's subsidiary findings and was unsupported by substantial evidence. Specifically, KCS showed that, on the face of the Commission's report, the particular dollar subsidiary findings of costs and benefits of the merger added up to far less than $47 million.[24] KCS also showed that certain important subsidiary findings on costs and benefits were based on superseded evidence and typographical and arithmetic errors. Consistent with the superficial review characteristic of the "independent judgment" standard, the Court of Appeals dismissed those errors as merely a choice of "two costing methodologies" entitled to deference. Slip Op. at 23-24, 736 F.2d at 720 (App. 23a).[25]

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[24] KCS argued that, on the face of the report, the Commission's subsidiary findings yielded a net public cost rather than a benefit.

[25] The Court of Appeals buttressed its conclusion that the Commission's findings met the "independent judgment" test by pointing to "non-quantifiable public benefits". Slip Op. at 24, n.9, 736 F.2d at 720, n.9 (App. 24a). The existence of "non-quantifiable public benefits" is a post hoc rationalization presented by the Commission's counsel to the Court of Appeals. The only example of non-quantifiable benefits in the Commission's brief to the Court of Appeals was single-system service. Commission's Brief to the Court of Appeals at 35-36 (App. 680a-681a). The benefit of single-system service was perhaps the principal factor UP relied on in projecting traffic diversions, and thus *was* quantified. 366 I.C.C. 489, 708, 791 (line item 1) (App. 86a-87a, 425a, 575a). Even "integrated management", of apparent significance to the Court of Appeals, Slip Op. at 24, n.9, 736 F.2d at 720, n.9 (App. 24a), although chiefly a private benefit to UP, was quantified by UP at least in part. 366 I.C.C. 500 (App. 103a-104a). *See also id.* at 791 (line items 2c, 3) (App. 575a). Especially in a case tried virtually entirely on the basis of economic and quantitative evidence, with extensive litigation over the economic ramifications of the transaction, *see* Appendices E-J to the Commission's report, 366 I.C.C. at 670-817 (App. 358a-613a), where the Commission purported to

The "independent judgment" test is so insubstantial that the Court of Appeals did not even understand how the Commission arrived at its $47 million figure. According to the Court of Appeals, the $47 million figure is the sum of four subsidiary figures found by the Commission.[26] These subsidiary figures, however, are but four among numerous reported figures appearing at pages 487-501 of 366 I.C.C. (App. 84a-105a). The only virtue of the particular figures chosen by the Court of Appeals is that their sum almost reaches $47 million ($46.4 million).[27] The figures used to derive the *Commission's* $47 million finding—the subsidiary findings that the Court of Appeals was supposed to review—appear at, and *only* at, 366 I.C.C. at 791 (Appendix H, "Commission Restatement Of Economic Benefits [in] Normal Year of Consolidation Operations") (App. 575a). These subsidiary findings bear no relation to the figures cited by the Court of Appeals. Had the Court of Appeals applied the substantial evidence test mandated by the APA, it could not have failed so utterly to understand the derivation of the $47 million figure.

Ironically, the very example the Court of Appeals chose to illustrate the Commission's "independent judg-

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arrive at very specific findings of net public benefit, 366 I.C.C. at 791 (App. 575a), the Court of Appeals' reliance on "non-quantifiable public benefits" is no more than another manifestation of the "judicial inertia" disparaged by *American Ship Building*, 380 U.S. at 318.

[26] The Court cites findings of $7.9 million in intermodal diversions, $5 million in facility consolidations, $32 million in equipment utilization and $1.5 million in administrative coordination. Slip Op. at 23, 736 F.2d at 719 (App. 23a). The $7.9 million figure is not even a finding, but merely an "estimate" submitted by UP. 366 I.C.C. at 488-89 (App. 86a).

[27] The Court of Appeals does not explain why it considered $7.9 million UP would receive from *inter*modal diversions to be a public benefit, but the $32.5 million UP would receive from *intra*modal diversions (a figure appearing in the Commission's opinion one line before, 366 I.C.C. at 488-89 (App. 86a)), not.

ment" represents the most serious arithmetic error committed by the Commission. The Court of Appeals pointed to the Commission's finding that, when UP "sought to equate the return on value of equipment saved with the value (replacement cost) for equipment required, the Commission demurred and adjusted the claimed saving downward. . . . [366 I.C.C.] at 777 (App. 559a-560a)."[28] Slip Op. at 24, 736 F.2d at 720 (App. 23a-24a). The Court of Appeals was correct that, *at page 777* (App. 559a-560a), the Commission had made the subsidiary finding that UP's savings on equipment should be adjusted downward by some $13.6 million annually. Nonetheless, because of the "independent judgment" test, the Court of Appeals failed to recognize that, *at page 791* (App. 575a), where net annual public benefits are tabulated for the "normal" year, the Commission had inexplicably failed to subtract the $13.6 million from the "equipment" entry. Thus, the $32 million reported in equipment utilization savings at line item 2h, 366 I.C.C. at 791 (App. 575a) ("$32,006[,000]"), is the identical, unadjusted amount submitted by UP for equipment utilization savings. 366 I.C.C. at 785 (line item 2g) (App. 569a) ("$32,006[,000]").[29]

In its brief, the Commission admitted to "minor mathematical or typographical errors in the Commission's charts, as charged by KCS". Commission's Brief

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[28] To the extent a merged system can provide pre-merger levels of service with less equipment, there is a savings, deemed a public benefit. In contrast, to the extent a merged system must purchase additional equipment to service diverted traffic, there is a cost, deemed a public cost.

[29] To similar effect is the Commission's failure to tabulate the costs of additional equipment purchases. The Commission made the subsidiary finding, based on UP submissions, at page 777 (App. 559a-560a), that substantial moneys would be so expended. The Commission's tables, however, report that *no* funds will be expended in *any* year, including the normal year, for such equipment requirements. 366 I.C.C. at 786-791 (line item 2g) (App. 570a-575a).

to the Court of Appeals at 36, n.18 (App. 681a). KCS, of course, denies that the errors are minor, but the question is how the Court of Appeals knew in light of the standard of review it applied. If an apparent "exercise of independent judgment", no matter how wrong, is "enough for [a court of appeals]", Slip Op. at 24, 736 F.2d at 720 (App. 24a), then the critical ultimate finding of where lies the public interest is effectively insulated from review. *See Baltimore & Ohio R. Co.*, 393 U.S. at 92.[30]

Apart from its impact on the determination of public-interest, the adoption of an "independent judgment" test in the review of administrative actions threatens to disrupt the delicate balance mandated by this Court's decisions construing the APA. An "independent judgment" standard renders the lengthy hearings, extensive expert evidence and expense of the parties in Commission proceedings superfluous. Were such a standard to gain currency in the courts of appeals, it would have a dramatic impact on the conduct of proceedings on rail consolidation applications, as well as adjudicatory proceedings before other agencies. The application of such a standard so far departs from the usual course of proceedings as to warrant this Court's exercise of its supervisory power.

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[30] The substantial evidence test does not require a reviewing court to correct the Commission's evidentiary errors. That is the Commission's task. Upon making necessary corrections, the Commission may conclude that there are insufficient benefits to satisfy the statutory public-interest standard. 49 U.S.C. § 11344(c). In this case, the fact that one Commissioner dissented and two of the five Commissioners who approved the merger expressed a desire to have more of its anticompetitive effects remedied, *see* 366 I.C.C. at 645-47, 649-52 (App. 315a-318a, 321a-327a), reveals that, had the Commission accurately calculated net public benefit, the merger might not have been approved at all.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE KANSAS CITY SOUTHERN RAILWAY COMPANY
and
LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioners,
v.
THE UNITED STATES OF AMERICA
and
THE INTERSTATE COMMERCE COMMISSION,
Respondents.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
BROTHERHOOD OF RAILWAY SIGNALMEN,
BROTHERHOOD OF RAILWAY & AIRLINE CLERKS,
INTERNATIONAL ASSOCIATION OF MACHINISTS &
AEROSPACE WORKERS,
and UNITED TRANSPORTATION UNION,
Petitioners,
v.
THE UNITED STATES OF AMERICA
and
THE INTERSTATE COMMERCE COMMISSION,
Respondents.

EDWARD K. WHEELER,
Petitioner,
v.
UNITED STATES OF AMERICA
and
THE INTERSTATE COMMERCE COMMISSION,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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[1] The list of subsidiaries, parents and affiliates of petitioners The Kansas City Southern Railway Company and Louisiana & Arkansas Railway Company (KCS) required by Supreme Court Rule 28.1 appear in KCS' petition for certiorari.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2253

SOUTHERN PACIFIC TRANSPORTATION COMPANY and
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
UNION PACIFIC CORPORATION, ET AL., and
CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
Intervenors

No. 82-2323

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
Intervenor

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[2]

No. 82-2342

EDWARD K. WHEELER,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
Intervenor

No. 82-2370

KANSAS CITY SOUTHERN RAILWAY COMPANY and
LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
UNION PACIFIC RAILROAD COMPANY,
DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
SOUTHERN PACIFIC TRANSPORTATION COMPANY, and
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Intervenors

No. 82-2371

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

UNION PACIFIC RAILROAD COMPANY, ET AL.,
DENVER & WESTERN RAILROAD COMPANY, and
CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
Intervenors

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[3] No. 82-2418

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, BROTHERHOOD OF RAILWAY SIGNALMEN, BROTHERHOOD OF RAILWAY & AIRLINE CLERKS, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, and UNITED TRANSPORTATION UNION,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
Respondents

UNION PACIFIC RAILROAD COMPANY, ET AL., and CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
Intervenors

No. 82-2340

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Petitioner

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents

UNION PACIFIC RAILROAD COMPANY, ET AL., and DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
Intervenors

No. 82-2479

AMERICAN TRAIN DISPATCHERS ASSOCIATION,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
Respondents

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
Intervenor

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[4] Petitions for Review of an Order of the Interstate Commerce Commission

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Argued June 6, 1983

Decided May 22, 1984

Richard L. Dashefsky for petitioners in No. 82-2370. *William R. Hyde, Jr.*, *Robert C. Eager*, and *Peter Sullivan* entered appearances for petitioners in No. 82-2253.

John H. Caldwell, with whom *Kendall T. Sanford* and *Denise M. O'Brien* were on the brief, for petitioner in No. 82-2323. *John G. DeGooyer* entered an appearance for petitioner in No. 82-2323.

Richard H. Streeter for petitioner in No. 82-2342. *Edward K. Wheeler* entered an appearance for petitioner in No. 82-2342.

Joseph Auerbach for petitioners in No. 82-2370. *Haywood H. Hillyer, Jr.*, *David M. Schwartz*, *Robert L. Calhoun*, and *Morris Raker* entered appearances for petitioners in No. 82-2370.

Dennis W. Wilson, with whom *Milton E. Nelson, Jr.* and *Robert R. Cowell* were on the brief, for petitioner in Nos. 82-2371 and 82-2430. *Richard E. Weicher* entered an appearance for petitioner in No. 82-2371.

John O'B. Clarke, Jr., with whom *Kimberly A. Madigan* was on the brief, for petitioner in No. 82-2418.

Gordon P. MacDougall was on the brief for petitioner in No. 82-2479.

Henri F. Rush, Associate General Counsel, Interstate Commerce Commission, with whom *John Broadley*, General Counsel, and *Laurence H. Schecker* and *John J. McCarthy, Jr.*, Attorneys, Interstate Commerce Commis-

sion, and *John J. Powers, III* and *Neil R. Ellis*, Attorneys, [5] Department of Justice, were on the brief, for respondents. *Nancy C. Garrison* and *Kenneth P. Kolson*, Attorneys, Department of Justice, entered appearances for respondents.

Fritz R. Kahn, William C. Evans, L. John Osborn, and *Elizabeth A. Campbell* were on the brief for intervenor Chicago & North Western Transportation Company.

M. Lauck Walton was on the brief for intervenors Missouri Pacific Corporation and Missouri Pacific Railroad Company.

Charles A. Miller, Joanne B. Grossman, and *Gregg H. Levy* were on the brief for intervenors Union Pacific Corporation, *et al.*

Walter G. Treanor entered an appearance for intervenor Western Pacific Railroad Company.

Before WRIGHT, MIKVA, and BORK, *Circuit Judges.*

Opinion *per curiam.*

PER CURIAM: The Interstate Commerce Commission decision that gives rise to these appeals responds to applications seeking authority for the Union Pacific Corporation (UPC) and its subsidiaries to acquire and exercise control over Missouri Pacific Corporation (MPC) and its carrier subsidiaries, and over Western Pacific Railroad Company (WP) and its carrier subsidiaries. Under the proposed consolidations the existing railroads and holding companies will retain their separate corporate identities but will be under the control of UPC and a new railroad holding company, Pacific Rail System, Inc. (PRSI). After extensive hearings, the Commission approved the consolidations, subject to certain conditions. *Union Pacific Corp., Pacific Rail System, Inc., and Union Pacific R.R.—Control—Missouri Pacific Corp. and Missouri Pacific R.R.* [*UPC-Control*], 366 I.C.C. 459 (1982).

[6] *The Commission Decision*

The applications for authority to create the consolidations at issue were filed on September 15, 1980.[1] The Commission accepted these applications for filing and published notice of the filing in the *Federal Register*, 45 Fed. Reg. 68,484 (Oct. 15, 1980). In response a long list of shippers, railroads, labor organizations, state governments, federal agencies, and shareholders filed comments either supporting or opposing the proposed consolidations or, in the event of Commission approval, seeking imposition of conditions upon the consolidations.[2]

Public hearings were conducted before two Administrative Law Judges from March 3, 1981 until January 6, 1982. On October 20, 1982, the Commission issued its final decision approving the consolidations but attaching certain conditions.[3] The opinion explaining the Commission's decision is comprehensive, consisting of 166 pages [7] with 12 appendices that comprise an additional 164 pages. *See UPC-Control*, 366 I.C.C. at 459-819.

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[1] The case involves two separate applications. Union Pacific Corporation, Pacific Rail System, Inc., and Missouri Pacific Railroad Company jointly filed an application seeking authority for UPC to control MPC. At the same time UPC and Western Pacific Railroad Company jointly filed an application seeking authority for UPC to control WP.

[2] For a useful summary of the positions taken toward the proposed consolidation by various parties, *see UPC-Control*, 366 I.C.C. at 474-482.

[3] At a press conference on September 13, 1982, the chairman of the Commission announced that the Commission had voted to approve the consolidations, with conditions, and that the decision of the Commission would be issued on or before October 20, 1982. That announcement immediately gave rise to a petition for review. This court dismissed that petition, however, because it was filed before the Commission's issuance of a final order. *Southern Pacific Transportation Co. v. ICC*, No. 82-2057 (D.C. Cir. Nov. 15, 1982). *See also Denver & Rio Grande Western R.R. Co. v. United States*, No. 82-2106 (10th Cir. Nov. 2, 1982) (dismissing related petition on same basis).

In considering the applications to consolidate UPC, MPC and WP the Commission noted first that under the Interstate Commerce Act (the Act) it is required to approve the consolidation if it finds the transaction to be "consistent with the public interest." *See* 49 U.S.C. § 11344(c) (Supp. V 1981). The Commission looked to a variety of factors that Congress has directed it to consider in determining whether a proposed consolidation meets the Act's broad public interest standard. These factors include criteria set forth in the Interstate Commerce Act, 49 U.S.C. § 11344(b) (Supp. V 1981), including an additional criterion added by the Staggers Act, 49 U.S.C. § 11344(b)(3); the Transportation Policy of 49 U.S.C. § 10101 (Supp. V 1981), as amended by the Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, § 5, 96 Stat. 1103, and the Rail Transportation Policy of 49 U.S.C. § 10101a (Supp. V 1981); recent rail reform legislation, especially the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (4R Act); antitrust legislation, especially the Clayton and Sherman Acts; and the Commission's own policy statement on rail consolidations, *Railroad Consolidation Procedures*, 366 I.C.C. 75 (1982), *see UPC-Control*, 366 I.C.C. at 483-87.

After considering this multitude of factors, the Commission weighed the public benefits likely to result from the proposed consolidation against its likely harmful consequences. In evaluating the potential harm arising from the consolidation, the Commission stated that it was particularly attentive to detrimental effects upon competition, the essential services of competing carriers, and the interests of employees. *UPC-Control*, 366 I.C.C. at 487. The Commission concluded that the consolidation will result in substantial public benefits stemming from the improved efficiency and reliability of a single-system service. [8] The Commission estimated that in quantitative terms the benefits will result in public savings of $47 million annually. *Id.*

On the other hand, the Commission observed that the proposed consolidation would entail certain negative consequences. Specifically, the Commission found that the proposed consolidation will have a significant adverse competitive effect on rail transportation of transcontinental traffic and on rail transportation in the Midwest. 366 I.C.C. at 533. The Commission, however, imposed conditions on the consolidations to allay these negative effects. As conditioned, the Commission found that the public benefits from the consolidations outweighed their negative effects. The Commission therefore approved the applications for consolidations, subject to the conditions it imposed. *Id.* at 642.

The Conditions Imposed

In deciding whether and what conditions to impose, the Commission's guide is the public interest. 49 U.S.C. § 11344(c). The conditions at issue were initially proposed by competitors or other opponents of the carriers seeking consolidation. In general, these opponents sought to convince the Commission to disapprove the consolidation altogether. Failing that, they sought to convince the Commission to impose conditions upon the consolidation that would lessen its impact upon their interests. The Commission adopted some of their proposals but rejected others.[4]

Kansas City Southern Railway Company (KCS) sought (1) imposition of trackage rights over MPC lines, (2) the right to purchase segments of MPC right-of-way trackage, and (3) certain traffic-protective conditions. [9] The Commission denied all of KCS's proposed conditions. It rejected empowering KCS with trackage rights and the right to purchase segments of MPC's right-of-way trackage because, in the Commission's view, neither

[4] We discuss only those proposals that are at issue in this appeal. For a summary of all the proposals directed to the Commission in these proceedings, *see UPC-Control*, 366 I.C.C. at 562-601.

of these conditions was shown to relate to the effects of the consolidation. The Commission rejected imposing traffic-protective conditions upon the consolidation on behalf of KCS because KCS had failed to demonstrate adequately its need for such protection. *See UPC-Control*, 366 I.C.C. at 593-97.

Denver & Rio Grande Western Railroad Company (DRGW) sought (1) trackage rights over lines owned by MPC and the Atchison, Topeka & Santa Fe Railway Company (ATSF), (2) independent ratemaking authority (IRA) over WP, and (3) traffic-protective conditions. The Commission granted DRGW's request for trackage rights, noting that this condition will mitigate competitive harms resulting from the consolidation, that it is operationally feasible, and that any harm the condition might cause to the consolidated system will be outweighed by the public benefit of added competition. 366 I.C.C. at 578. ATSF challenged that part of the Commission's order which provided DRGW with trackage rights over certain segments of ATSF lines. ATSF claimed that the Commission was without jurisdiction to impose trackage rights over these segments of its lines. The Commission rejected ATSF's challenge on the ground that the line segments at issue come within its statutory authority under 49 U.S.C. § 11103 (Supp. V 1981) to require terminal facilities, including mainline tracks for a reasonable distance outside of a terminal, to be used by another rail carrier if the Commission finds that use to be practicable and in the public interest. 366 I.C.C. at 573-78.

The Commission denied DRGW's request for independent ratemaking authority and traffic-protective conditions. DRGW sought the merged system's automatic concurrence to rates set by DRGW when it uses a route which includes WP's northern California lines. The proposed [10] independent ratemaking authority would enable DRGW to quote rates between northern California and Kansas City while providing service between Utah and

Kansas City. The Commission rejected the proposal on the ground that empowering DRGW with the authority it sought would decrease its incentive to cooperate with another carrier, Southern Pacific Transportation Company (SP), in creating alternative services to those provided by the consolidated systems and therefore decrease overall competition. 366 I.C.C. at 578-79. The Commission rejected DRGW's request for traffic-protective conditions because, in its view, such conditions are generally anticompetitive and DRGW failed to show any special circumstances justifying imposition of such conditions. *Id.*

The Commission stated that in addition to considering the effects of the proposed consolidation upon competing carriers, it must also consider the interests of, and provide protection for, the employees of the consolidating carriers. *See* 49 U.S.C. §§ 11347 and 11344(b)(4) (Supp. V 1981). Labor organizations, including the Brotherhood of Maintenance of Way Employees (BMWE) and the American Train Dispatchers Association (ATDA), proposed imposing a wide variety of labor-protective conditions upon the consolidations. The Commission imposed what it describes as "the minimum protections to be afforded those employees affected by a consolidation, absent a voluntarily negotiated agreement." *UPC-Control*, 366 I.C.C. at 619. These protections are derived from the Commission's decision in *New York Dock, New York Dock Ry.—Control—Brooklyn Eastern District*, 360 I.C.C. 60, *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). These protections include a mandated 90-day notice of employment actions, negotiated implementation of employment changes resulting from a consolidation with compulsory arbitration of disputes, and compensation for dismissed employees. The Commission rejected labor-protective conditions broader in scope than those established in *New York Dock* because, in the [11] Commission's view, these organizations failed to show unusual circumstances which would warrant increased protection. *UPC-Control*, 366 I.C.C. at 620.

In deciding whether to approve the proposed consolidations, the Commission also considered whether the terms it offered to affected stockholders were fair and reasonable. *See* 49 U.S.C. § 11344; *Schwabacher v. United States*, 334 U.S. 182 (1948). Edward K. Wheeler, a minority stockholder of SP stock, objected to the $20 per share price offered for WP Class A common stock on the ground that that price fails to reflect the full range of WP's assets and is therefore unreasonably low. The Commission, using a different method of computation from that suggested by Wheeler, found that the $20 per share price was fair and rejected Wheeler's objection. *UPC-Control*, 366 I.C.C. at 632-40.

Standard of Judicial Review

The Interstate Commerce Act has empowered the Commission with broad authority to approve railroad consolidations and to impose conditions upon them. A corollary to this grant of wide authority is that courts must show considerable deference to the Commission's determinations. The Administrative Procedure Act (APA), 5 U.S.C. § 706 (1982), governs the scope of our review of the Commission. *See Illinois Central R.R. v. Norfolk & Western Ry.*, 385 U.S. 57, 66 (1966); *Missouri-Kansas-Texas R.R. v. United States*, 632 F.2d 392, 399 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981). Under the APA we must

> (2) hold unlawful and set aside agency actions, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or]
>
> * * * *
>
> [12] (E) unsupported by substantial evidence * * * [.]

5 U.S.C. § 706(2)(A) & (E).

The Fifth Circuit has ably described the practical application of this standard to Commission decisions, observing that it is not a court's task "to re-weigh the evidence or to draw our own inferences from the evidence before the Commission. * * * We can ask only whether the Commission has observed the statutory limits that Congress has set for its discretion, whether its action was arbitrary or capricious, or whether its findings are supported by adequate analysis and substantial evidence in the record considered as a whole." *Missouri-Kansas-Texas R.R. v. United States*, 632 F.2d at 398-99. If the Commission's decision meets these deferential standards, we must affirm it. We are persuaded that it does.

Issues on Appeal[5]

This appeal principally involves six issues. They are as follows:

1. Did the Commission properly decide that the proposed consolidation is consistent with the public interest?
2. Did the Commission properly deny KCS's request for certain trackage rights?

[13] 3. Did the Commission have jurisdiction to order that certain segments of ATSF track be made available to SP and DRGW?

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[5] This appeal marks the fourth time this court has encountered this case. We mention above that this court dismissed a petition for review that was filed prior to issuance of the Commission's final order. *See* note 3 *supra*. This court encountered this case a second time when petitions for review were filed immediately upon issuance of the Commission's final order. *Southern Pacific Transportation Co. v. ICC*, No. 82-2253 (D.C. Cir. filed Oct. 20, 1982). Petitioners filed motions to stay the Commission's decision. This court denied the motions for stay but entered a temporary stay to allow the parties to seek a stay from the Supreme Court. The Supreme Court also denied petitioners' request. Subsequently, two of the petitioners filed motions with this court requesting that it summarily reverse the Commission's decisions. These motions, too, were denied.

4. Did the Commission properly deny DRGW's request for independent ratemaking authority?
5. Did the Commission properly deny protective conditions requested by labor organizations?
6. Did the Commission properly evaluate the fairness of the price per share offered to minority shareholders of WP stock?

We affirm the Commission's decision on all issues except the fourth, which we remand to the Commission for further proceedings not inconsistent with this opinion. Additional, relatively minor, issues were raised by petitioners and will be referred to where appropriate. However, having carefully considered these subsidiary issues and the challenges giving rise to them, we find petitioners' arguments concerning these matters to be without merit.

1. *The Public Interest Decision*

Petitioners challenge the Commission's determination that the proposed consolidation is "consistent with the public interest" on a number of grounds. Petitioners' primary contention is that the ICC ignored Congress' directive that "competitive considerations and the policies of the antitrust laws assume critical and, indeed, controlling significance in any assessment of whether a merger should be approved." Brief for Petitioners SP at 14. Petitioners argue that the conceded anticompetitive effects of the merger outweigh any public benefits the merger may create. Brief of Petitioners KCS at 17-24. In addition, petitioners maintain that the ameliorative conditions imposed on the merger by the ICC were insufficient to offset the anticompetitive consequences of the merged system. *See, e.g.*, Brief for Petitioner DRGW at 16.

[14] (a) *The role of competitive effects in the statutory scheme*

Petitioners' basic contention is that Congress has recently changed the law so as to forbid the Commission

from approving any merger with admittedly anticompetitive effects such as this one. *See, e.g.*, Brief for Petitioners SP at 14 ("[T]he ICC . . . refused to employ a standard which incorporates recent changes in Congressional direction regarding the rail industry."). We do not agree that the Commission is required to give anticompetitive effects not merely substantial but dispositive weight. We think that the Commission properly recognized that while competition is a "major factor" in its calculus, its "primary inquiry" is still to be conducted under the terms of the Interstate Commerce Act. In deciding whether a proposed merger is "consistent with the public interest," 49 U.S.C. § 11344(c) (Supp. III 1979), the Commission has traditionally considered four factors:

1. the effect of the proposed transaction on the adequacy of transportation to the public.
2. the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.
3. the total fixed charges that result from the proposed transaction.
4. the interest of carrier employees affected by the proposed transaction.

49 U.S.C. § 11344(b) (Supp. III 1979). After this merger had been submitted to the Commission, Congress passed the Staggers Act, which added a fifth factor to this list: "whether the proposed transaction would have an adverse effect on competition among carriers in the affected area." 49 U.S.C. § 11344(b)(5) (Supp. IV 1980). Although the Staggers Act is not formally applicable to this proceeding, the Commission elected to adhere to its policies. *UPC-Control*, 366 I.C.C. at 488. The Commission's determination as to a proposed merger is also guided by the criterion set forth in the Transporta-
[15] tion Policy of 49 U.S.C. 10101 (Supp. V 1981), as

amended by the Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, § 5, 96 Stat. 1103,[6] the Rail Transportation Policy of 49 U.S.C. § 10101a (Supp. V 1981),[7]

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[6] 49 U.S.C. § 10101

(a) Except where policy has an impact on rail carriers, in which case the principles of section 10101a of this title shall govern, to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and—

(1) in regulating those modes—

(A) to recognize and preserve the inherent advantage of each mode of transportation;

(B) to promote safe, adequate, economical, and efficient transportation;

(C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(D) to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices;

(E) to cooperate with each State and the officials of each State on transportation matters; and

(F) to encourage fair wages and working conditions in the transportation industry;

. . . .

[7] 49 U.S.C. § 10101a

In regulating the railroad industry, it is the policy of the United States Government—

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

[Continued]

[16] and the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), which encourages "efforts to

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[7] [Continued]

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

re- [17] structure the [railway system of the United States] on a more economically justified basis." 45 U.S.C. § 801 (1982). Taken together, these statutes, both new and old, evince Congress' intent that a merger's effects on competition be accorded substantial weight in determining whether the merger should be approved. The recent changes—more specifically, the Staggers Act and section 10101a—have not, however, changed the law so drastically such that the Commission was incorrect in stating that its "primary inquiry is conducted under the terms of the Interstate Commerce Act." 366 I.C.C. at 503. The very terms of the relevant statutes, focusing as they do on numerous factors in addition to competition, belie the assertion that Congress intended the effect upon competition to outweigh all other factors combined.

The increased emphasis upon competition required by Congress modifies but does not basically alter the ICC's traditional approach, which has always considered the competitive impact of a proposed merger, but not to the exclusion of other factors. The antitrust laws do give "understandable content to the broad statutory concept of the public interest," *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 244 (1968), but the Supreme Court has held that, in deciding whether to approve a carrier consolidation

> the Commission must estimate the scope and appraise the effects of the curtailment of competition [18] which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission "to the end that the wisdom and experience of that Com-

> mission may be used not only in connection with this form of transportation, but in its coordination of all other forms." "The wisdom and experience of that commission," not of the courts, must determine whether the proposed consolidation is "consistent with the public interest."

McLean Trucking Co. v. *United States*, 321 U.S. 67, 87-88 (1944) (citations omitted). In short, the Commission has never sat "as an antitrust court [to determine] compliance with the Clayton, Sherman, or related antitrust acts." 366 I.C.C. at 485, *citing United States* v. *ICC*, 396 U.S. 491, 514 (1970). Its statutory mandate is considerably broader. The ICC can disapprove mergers which would not violate the antitrust laws and can approve mergers even if they otherwise would violate the antitrust laws. *United States* v. *ICC*, 396 U.S. at 513-14. The Commission has acknowledged that section 10101a and the Staggers Act require it to "take even greater care to identify harmful competitive effects and to mitigate those effects where possible," 366 I.C.C. at 502, but its basic approach remains unchanged. The Commission has always, and should continue, to perform a balancing test which takes a myriad of factors—including competition—into consideration and weighs "the potential benefits to applicants and the public against the potential harm to the public." *Id.* at 486, *quoting* 49 C.F.R. § 1111.10(c) (1981).

Here, the Commission did just that. Basically, the ICC balanced the admittedly serious anticompetitive effects of [19] the proposed merger against the benefits anticipated to the public and concluded that, subject to certain conditions, this merger is consistent with the public interest. It is a truism that we owe the Commission substantial deference in reviewing its decisions. *Illinois Central R.R.* v. *Norfolk & Western Ry.*, 385 U.S. 57, 69 (1966) (in reviewing Commission consolidation decisions, courts are limited to determining whether the Commission's conclu-

sions are reasonably drawn from the evidence and findings in the case); *Florida East Coast Ry.* v. *United States*, 259 F. Supp. 993, 1002 (M.D. Fla. 1966), *aff'd*, 386 U.S. 544 (1967) (three-judge district court) (A court's "task is at an end when [the court is satisfied] that the Commission has made adequate findings supported by substantial evidence, that it has perceived the danger areas, and judging by the statutory standards has concluded that the public interest is best served by allowing the merger.").

Given this standard of review, it is clear that the Commission's decision here must be upheld. A review of the Commission's opinion reveals that it did not ignore the importance of competition in considering whether to approve the proposed consolidation. *See, e.g., UPC-Control*, 366 I.C.C. at 501-33. On the contrary, the Commission expressly stated that "[t]he competitive impact of a consolidation proposal is a major factor in our consideration of the public interest." *Id.* at 501. The Commission was "cognizant of the increased importance of [its] competitive analysis," *id.* at 502, and took "substantial guidance" from the antitrust laws but held that, ultimately, its "primary inquiry is conducted under the terms of the Interstate Commerce Act." *Id.* at 503. The Commission's opinion exhaustively reviews the competitive effects of the proposed merger. *Id.* at 501-33. Its survey of both the parallel and end-to-end effects (roughly analogous to horizontal and vertical effects, respectively, *see id.* at 505) in the relevant geographic markets and submarkets led it to conclude that

> **[20]** [t]he proposed transactions will have a significant adverse competitive effect (1) on rail transportation of transcontinental traffic, especially in the central corridor; and (2) on rail transportation in the Midwest, especially traffic moving through the corridor between Omaha/Council Bluffs and destined to the Gulf.

Id. at 533. The Commission found no "significant adverse competitive effects in any other area which arise from the consolidations." *Id.* Because the Commission believed that the negative effects could be ameliorated, it approved the proposed merger.

Petitioners are not satisfied with this. They object to the ICC's failure to base its decisions on a post-merger "market share analysis." *See, e.g.*, Brief of Petitioner ATSF at 21-30. Had such an analysis been conducted, petitioners maintain, the mammoth market share acquired by intervenor UP in the central corridor route would have compelled the Commission to disapprove of the proposed merger. There are at least two problems with this argument. First, as noted above, the Commission is not limited to a consideration of only the competitive impact of the merger. If the Commission believes that a proposed merger will substantially benefit the public, it can approve that merger even if those benefits are unrelated to competition. Petitioners' argument here is simply a repetition of their contention, which we have already rejected, that a showing of the likelihood of anticompetitive consequences sweeps the board. Second, the traditional market-share analysis may not be mechanically applied in this context. The market shares in the rail industry, both before and after the merger, are "extremely high by conventional antitrust standards." 366 I.C.C. at 512. But merely adding the pre-market shares of the merging railroads would not necessarily have told the Commission anything definitive. One of the conditions the Commission imposed on this merger created a wholly new competitor in the central corridor, the SP/ [21] DRGW route. The Commission sought to predict the economic viability of the new route based upon the known technical and business characteristics of its component railroads. In reviewing other mergers, the Commission has recognized that diversion projections are of limited utility because they presuppose a static market

when experience has shown that the competitive response of competing carriers following Commission approval of a consolidation will dramatically alter a marketplace's dynamics. *Burlington Northern, Inc.—Control & Merger —St. Louis-San Francisco Ry.*, 360 I.C.C. 784, 962, *aff'd sub nom. Missouri-Kansas-Texas R.R.* v. *United States*, 632 F.2d 392, 406 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981); *CSX Corp.—Control—Chessie & Seaboard Coast Line Industries, Inc.*, 363 I.C.C. 518, 631-32 (1980).[8] This is especially relevant here, where the Com-

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[8] This competitive response is also at the heart of the Commission's decision to remove the so-called "Bieber" conditions it imposed on Burlington Northern ("BN") in Great Northern Pacific—Merger—Great Northern, 331 I.C.C. 228, 281-82, 352-54 (1967), *aff'd sub nom.* United States v. United States, 296 F. Supp. 853 (D.D.C. 1968) (three-judge court), *aff'd sub nom.* Northern Lines Merger Cases, 396 U.S. 441 (1970). These traffic protective conditions help preserve the route between Bieber and Keddie, California by requiring BN to maintain rates over that route that are at least as favorable as those offered over alternative routes. *UPC-Control*, 366 I.C.C. at 592; Joint Brief for the ICC and the USA at 49 n.27. They also require BN preferentially to solicit traffic for the Bieber route. *Id.* These conditions were orginally imposed to cure specific competitive harms which the Commission believed would befall ATSF, WP and the shipping public if the Bieber route were allowed to deteriorate. 331 I.C.C. at 282-83.

The Commission removed the conditions for two reasons. First, "the justification for the Bieber conditions will no longer exist after consolidation," because WP will no longer be dependent upon interchanges with BN, SP or ATSF. 366 I.C.C. at 592. Second, the Commission believed that the proposed consolidation might harm competition in the West Coast north-south market. It was relying on the competitive response of other railroads, especially the BN, SP and DRGW, to offset the adverse competitive effects of the merger in this market. Therefore, the Commission was unwilling to "limit BN's competitive response to the new system" by "[c]ontinuing to require BN to hand off traffic to WP at Bieber." *Id.* When the Bieber conditions were first imposed, the WP was "a small, neutral interline carrier, and 20 percent of its total freight revenues were obtained from Bieber traffic." *Id.* After the consolidation, the WP will not need the protection of these conditions. To that extent the Commission is correct that the justification for the

[22] mission has created an entirely new line through the transcontinental central corridor. *See, e.g.*, 366 I.C.C. at 515, 576-78 (explaining what will mitigate the anti-competitive effects of the merger with respect to SP and assessing the competitive capacity of DRGW). Under such circumstances, the arithmetic of today's market shares cannot control the Commission's inquiry.

(b) *The public benefits*

Next, petitioners attack the "benefit" side of the equation, arguing that the merger would not produce the [23] benefits to the public that the Commission believes it would. The Commission found that

> [t]he proposed consolidation of UP-MP-WP will result in substantial public benefits. Shippers and the general public will benefit by the improved efficiency and reliability of single system service, as well as the efficiency related savings of $47 million annually. These savings are likely to result in rate decreases, deferrals of rate increases, and a more financially viable system.

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conditions no longer exists. Moreover, ATSF's contention that there may be adverse competitive effects which the Commission failed to consider is based on a premise that is by no means inevitable—that BN will down-grade the Bieber route. Brief of Petitioner ATSF at 61. The Commission expressly found that "UP will have an economic incentive for continued participation in movements over WP's Bieber route." 366 I.C.C. at 527. As such, BN will continue to route traffic over WP's Bieber route (and eventually to ATSF), so long as it is economically prudent for it to do so.

It is the ICC's intention that "economic conditions and competition . . . dictate appropriate routes" after the merger. 366 I.C.C. at 528. Removal of the Bieber conditions helps to ensure that "BN, SP and DRGW are positioned to compete for traffic which otherwise would go to the new UP system." *Id.* at 592. Given the importance of the competitive response of other railroads to the Commission's approval of this merger, we uphold the Commission's decision to lift the Bieber conditions.

366 I.C.C. at 501. This $47 million figure is the sum of net revenue gains of $7.9 million derived from intermodal (motor carrier to rail carrier) diversion; cost savings of $5 million from the consolidation of facilities leading to reduced equipment needs, lower car hire and car maintenance expenses, reduced labor force and lower terminal company charges; annual cost savings of $32 million due to improved equipment utilization; and savings of $1.5 million due to improved administrative coordination as a result of the consolidation of UP and WP mechanical and maintenance departments and because joint purchases will permit volume discounts by equipment manufacturers.

Petitioners challenge these figures as being "wholly unreliable." Brief of Petitioners KCS at 25. According to KCS, the Commission's calculation of quantifiable public advantage was technically faulty and the actual present-value figure for public benefits (calculated before the costs of reduced competition are taken into account) would be, at most, $11.9 million. *Id.* at 36. Taking into account uncorrected anticompetitive effects, KCS maintains, the annual net cost to the public of the proposed merger is at least $7.1 million per year. *Id.* at 38.

A review of the Cost and Benefit Analysis in Appendix II to the Commission's opinion convinces us that we should accept the Commission's figures. A decision as which of two costing methodologies to adopt is precisely the [24] kind of judgment which agencies, not courts, ought to make. The Commission satisfied itself that the methodology employed was acceptable. For example, here the Commission accepted, and indeed commended, the applicants' approach as making "achievable" "a figure for both the annual net benefits and combined annual net benefits plus one-time benefits." 366 I.C.C. at 776. The Commission was not, however, uncritical; it did not accept applicants' approach wholesale. Thus, when the applicants sought to equate the return on value of equip-

ment saved with the value (replacement cost) for equipment required, the Commission demurred and adjusted the claimed saving downward. *Id.* at 777. Moreover, the Commission recognized that the cost-benefit analyses attempted necessarily required that certain estimates and assumptions be made. *Id.* at 776. We do not mean to focus attention on any particular item in the calculation but only to illustrate the sort of task that KCS would have us undertake. Were we to attempt a review so detailed and searching, we would be duplicating the extensive work of the Commission and doing so without its resources or expertise. That is not, and cannot be, the function of a reviewing court. We are not free to consider whether this consolidation satisfies our own conception of the public interest—that is the Commission's job. *Penn Central Merger Cases*, 389 U.S. 486, 498-99 (1968); *Brotherhood of Maintenance of Way Employees* v. *United States*, 221 F. Supp. 19, 30 (E.D. Mich), *aff'd*, 375 U.S. 216 (1963). The record clearly shows that the ICC exercised its independent judgment and expertise with respect to the calculation of public benefits. That must be enough for us, particularly in such a fact-bound and technical area.[9]

[25] (c) *The conditions imposed*

Petitioners also challenge the conditions imposed by the ICC on the merger. The Commission did find that this merger, without certain ameliorative conditions, would have significant adverse impact on competition. 366

[9] In this appeal the Commission also emphasizes the significance of non-quantifiable public benefits. This troubles petitioners because a reviewing court is forced to defer substantially to the Commission in assessing such a finding. This may be true, but it is not particularly germane to this case; the non-quantifiable benefits on which the Commission relies, for example, the increased flexibility of a single system's integrated management, are sufficiently obvious to assure us that the Commission's decision here rests on firm ground.

I.C.C. at 517, 533. Therefore, the Commission granted DRGW trackage rights over the merged system from Kansas City to Pueblo, Colorado and SP rights between St. Louis and Kansas City. The effect of this extensive grant was to create a new central corridor route from St. Louis to the West, with SP at either end and DRGW in the middle. The Commission concluded that this new route would "provide an effective competitive alternative to the UP system in the central corridor." *Id.* at 577. This finding was based on the Commission's assessment of the strategic location of the SP and DRGW lines and those railroads' operational capabilities. *See, e.g., id.* at 515 (western end of SP more extensive and efficient than WP). Also, the Commission carefully tailored the trackage rights to match anticompetitive effects. *See, e.g., id.* at 515-16 (importance to DRGW of loss of neutral Pueblo-Kansas City carrier). We noted above that in analyzing the response of a dynamic market, the Commission was entitled to engage in such operational scrutiny without presenting quite possibly irrelevant market-share figures. Plainly, this issue involved the kind of "judgmental or predictive" conclusion with respect to which judicial deference to agency expertise is especially appropriate. *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 813-14 (1978). In fact, our scope of review of the Commission's decisions as to protective conditions is even more narrow than our scrutiny of its public interest determination. *See supra* p. 24. The Commission has [26] extraordinarily broad discretion to impose protective conditions, 49 U.S.C. § 11344 (c), and courts have appropriately given the Commission's selection of such conditions great deference. *Seaboard Coast Line R.R.* v. *United States*, 599 F.2d 650, 652 (5th Cir. 1979); *Florida East Coast Ry.* v. *United States*, 259 F. Supp. 993, 1001 (M.D. Fla. 1966), *aff'd*, 386 U.S. 544 (1967).

While the Commission accorded SP and DRGW extensive trackage rights over the merged line, it did not set the terms under which UP would be paid for the use

of its track. Rather, the Commission instructed the parties to seek to negotiate agreeable compensation terms according to general criteria outlined in the decision, subject to the ICC's power to fix terms in the absence of an agreement. 366 I.C.C. at 589-90. This procedure was entirely rational, in that the ICC specifically provided that the terms, whether agreed to or imposed, must be such as to make the new transcontinental corridor (SP/DRGW) competitive with the merged system. *Id.* at 590. Southern Pacific's argument that absent fixed terms it is impossible to tell whether the SP-DRGW route will be competitive is thus upside-down; we trust the Commission to ensure that the compensation terms will not defeat the purpose of the trackage rights. The ICC has in fact guaranteed that it will see to the proper functioning of the trackage rights. *Id. See Baltimore & Ohio R.R.* v. *United States*, 386 U.S. 372, 389 (1967) (ICC faulted for failing to provide protection it thought necessary). Nor was there anything cryptic about the Commission's decision on this point, as DRGW suggests, we sustain the ICC's decision on trackage rights compensation terms.[10]

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[10] Petitioner SP also contends that the ICC's approval of this merger violates the Pacific Railroad Acts. Act of July 1, 1862, ch. 120, 12 Stat. 489; Act of July 2, 1864, ch. 216, 13 Stat. 356, *codified at* 45 U.S.C. § 83 (1982). We disagree. In approving a consolidation such as this one, the ICC has the express authority to "exempt [a carrier] from the antitrust laws and from *all other law*, including State and municipal law, as necessary to let that person carry out the transaction . . . ." 49 U.S.C. § 11341(a) (Supp. V 1981) (emphasis added). The Supreme Court long ago expressly rejected SP's argument that the ICC's exemption authority is limited to antitrust and similar restraining and prohibitory laws. Texas v. United States, 292 U.S. 522, 534 (1934). The ICC need only consider the policies expressed in those Acts in determining whether the consolidation is in the public interest. *See Northern Lines Merger Cases*, 396 U.S. at 511-13. We are satisfied that the Commission adequately considered the Pacific Railroad Acts' policies. 366 I.C.C. at 548-62.

The Commission held, first, that the proposed merger did not violate the statutory requirement that "the whole line of said railroad shall be operated and used for all purposes . . . as one con-

[27] 2. *The Commission's Denial of Trackage Rights to KCS*

Petitioner KCS challenges the Commission's denial of its application for trackage rights on MPC lines to expand KCS's service within eastern Texas and Louisiana.

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nected continuous line." 45 U.S.C. § 83. Southern Pacific's contention is that the Acts "required much more than a mere physically continuous railroad." Brief for Petitioners SP at 65. The Supreme Court has made clear that this part of the Act was intended to secure the permanent physical connection of a transcontinental route and the conduct of through operations over it. *See* Union Pacific R.R. v. Hall, 91 U.S. 343, 353-54 (1876). *See also* United States v. Union Pacific R.R., 226 U.S. 61, 91-[illegible] 1912); Southern Pacific Co. v. United States, 277 F. Supp. 671, 679 (D. Neb. 1967). After the consolidation, UP will continue to interchange traffic with SP at the Utah gateway, thus ensuring that SP and UP are still part of "one continuous line" of transcontinental traffic. Also, we agree with the Commission that "the fundamental purpose of the 'one continuous line' provision will . . . be satisfied by the existence of several other alternative transcontinental routes . . . ." 366 I.C.C. at 552. Second, the Commission rejected SP's contention that the Pacific Railroad Acts granted to it certain unspecified "vested rights" that are violated by the merger. Southern Pacific's claim is specious. The Acts create contract rights between the party railroads and the federal government, not between the party railroads themselves. The Commission's action does not impair any rights SP has with respect to the federal government. *See* Burke v. Southern Pacific R.R., 234 U.S. 669, 680 (1914); United States v. Union Pacific R.R., 98 U.S. 569, 613-14 (1878).

The Commission concedes that SP's final claim—that the approval merger violates the nondiscrimination provision of the Pacific Railroad Acts—has merit, but it held that it was not barred from "immuniz[ing] the carriers from operation of the nondiscrimination provisions where, as here, we have found that the UP/WP consolidation is in the public interest." 366 I.C.C. at 553. Although the ICC's explanation is not entirely clear, we read its opinion to mean that, in the Commission's view, the other benefits of this merger outweigh the harmful effects of discrimination which the Pacific Railroad Acts seek to avoid. Since, as noted above, the Commission's determination of the public interest is entitled to deference, *see supra* p. 24, we uphold the Commission's decision.

[28] The theory of KCS's application is that the public interest in effective rail competition requires the imposition of this condition upon the consolidation. KCS claims that, absent the grant of the trackage rights its requests, the public will never have effective rail competition in these markets.

The conditions KCS proposed were concededly unrelated to the consolidation at issue. They were not designed to mitigate any anti-competitive consequences stemming directly from the consolidation. Rather, KCS's proposed conditions represent its vision of what effective rail competition in eastern Texas and Louisiana requires irrespective of the consolidation.

The Commission properly denied KCS's request. *See UPC-Control*, 366 I.C.C. at 562-65. The Commission's criteria regarding the imposition of conditions clearly establish that conditions are not to be used to address problems unrelated to a merger or consolidation. *See, e.g., Burlington Northern, Inc.—Control & Merger—St. Louis-San Francisco Ry.*, 360 I.C.C. at 952 ("conditions on a merger are not to be used to ameliorate longstanding problems which were not created by the merger"); *Railroad Consolidation Procedures*, 366 I.C.C. at 92. This [29] position, strongly supported by both the Department of Justice and the Department of Transportation, reasonably effectuates the Commission's statutory mandate. As the Commission noted, "[i]mposing conditions unrelated to a merger's impact, upon a transaction otherwise consistent with the public interest, would be at odds with the Congressional policy that privately-initiated transactions should be approved so long as they are consistent with the public interest." *UPC-Control*, 366 I.C.C. at 564. Once the Commission determined that the conditions imposed upon the consolidation had rendered that consolidation consistent with the public interest, it was under no compulsion further to reform the proposed consolidation. KCS sought to use the proposed consolidation as a spring-

board from which to launch a request for conditions having no connection with that consolidation. But the Commission is not required to act as a roving ombudsman restructuring railroads on its own in order to satisfy an individual carrier's notion of what effective competition may require.

3. *The Commission's Jurisdiction over ATSF's Track*

The MPC lines over which the Commission granted SP and DRGW trackage rights involve two segments of track, one eight miles long and the other twelve, owned by ATSF. ATSF challenges the Commission's decision to award SP and DRGW rights over its track on three grounds: 1) the Commission lacks jurisdiction under 49 U.S.C. § 11103(a) to make such an award; 2) even if jurisdiction exists, the Commission violated 49 U.S.C. § 11103(a) by allowing SP and DRGW to use ATSF's track before compensation had been "paid or adequately secured"; and 3) the interim agreement between UPC and DRGW allowing DRGW to move its cars in MPC's trains along a segment of ATSF's track is illegal because it is a pooling arrangement and was not approved under 49 U.S.C. § 11342 (Supp. V 1981). We have fully considered ATSF's arguments and conclude that the Com-[30] mission's decision to grant SP and DRGW rights over ATSF's track was not improper.

Under 49 U.S.C. § 11103(a), the Commission has the authority to order one carrier to allow another carrier to use its "terminal facilities, including main-line tracks for a reasonable distance outside of a terminal" if the use is "practicable and in the public interest." ATSF argues that the term "terminal facilities" is limited in meaning to trackage that is within the operating limits of the terminal area and that is used for terminal purposes. It contends that SP and DRGW will use the segments for through service only and that the segments are not within the operating limits of the Kansas City or Pueblo

terminals. In addition, ATSF claims that the Commission did not limit its consideration of the "public interest" to an examination of the improvements in rail service in the relevant terminal area.

The Commission has long held that the "terminal facilities" should be broadly construed because the purpose of the section is highly remedial. *See, e.g., CSX Corp.—Control—Chessie System, Inc. & Seaboard Coast Line Industries, Inc.*, 363 I.C.C. at 585; *City of Milwaukee v. Chicago & N.W. Ry.*, 283 I.C.C. 311, 314 (1951). The purpose of this section is to avoid "unnecessarily duplicated" lines, and it is not necessarily limited to benefiting the rail service in the relevant terminal area. *See Spokane, Portland & Seattle Ry.*, 348 I.C.C. 109, 142-43 (1975). Here, the Commission held that the use of ATSF's track was necessary to allow SP and DRGW to enter the Kansas City and Pueblo terminals and that the use was practicable and in the public interest because it allowed the Commission to create a competitive alternative in the central corridor to the new UPC system. *See UPC-Control*, 366 I.C.C. at 573-78 (DRGW-Pueblo), 586-89 (SP-Kansas City). This determination is consistent with Commission precedent. In *Chicago & Alton R.R. v. T.P. & W. Ry.*, 146 I.C.C. 171, 179 (1928), and [31] *Spokane, Portland & Seattle Ry.*, 348 I.C.C. at 142-43, the Commission granted one carrier the right to move over twelve and six-and-three-quarter mile segments of another carrier's line. In both those cases, the Commission granted the rights so that the carriers might "bridge the gap" between their line and the terminal. It did not require in either case that the segments be used for terminal purposes.

The Commission has never held 49 U.S.C. § 11103(a) or its predecessor to require that the term "terminal facilities" be limited to the trackage within the operating limits of the terminal. In any event, the segment near the Pueblo terminal is actually within that terminal's

limits, *UPC-Control*, 366 I.C.C. at 574, and the segment near the Kansas City terminal is halfway within that terminal's limits. *Id.* at 587-88. We hold, therefore, that the Commission has the jurisdiction to make the trackage rights awards.

Under 49 U.S.C. § 11103(a) there is an additional requirement that the compensation for use of the "terminal facilities" must be "paid or adequately secured" before the use can commence. ATSF argues that this condition was not met because the trackage rights were made immediately effective and no agreement as to compensation was made. It is true that the Commission directed the parties to negotiate the terms of compensation among themselves, *UPC-Control*, 366 I.C.C. at 589-90, and that no agreement was reached prior to the commencement of the transaction. Nonetheless, the Commission did indicate that if the parties failed to agree it would "apply the principles for compensation in condemnation proceedings." *Id.* at 576 n.114. We hold that the Commission is bound by this statement and that it fulfills the requirement of the term "adequately secured" under 49 U.S.C. § 11103(a). We find it appropriate to note at this time that, because the use of ATSF's track was adequately secured, ATSF has suffered no injury under the Interstate [32] Commerce Act and that its arguments are more directed at derailing the merger rather than protecting its rights.

ATSF's final argument is that the interim agreement between UPC and DRGW allowing DRGW to move its cars in MPC's trains along a segment of ATSF's track is illegal because it is a pooling arrangement and was not approved under 49 U.S.C. § 11342. This argument has been fully considered and rejected by the Commission. *See* Joint Appendix at 357-62, 365-70. In any event, ATSF's claim is now moot because the interim agreement is no longer in effect.

4. *DRGW's Request for Independent Ratemaking Authority*

In addition to trackage rights, DRGW requested that the Commission approve a condition for independent ratemaking authority ("IRA") over the WP portion of the merged system. This IRA, set out in Appendix D-2 of the Commission's opinion, would have required WP to accede to rates set by DRGW.[11] It would have provided the merged system's automatic concurrence to any rate the DRGW wished to set in conjunction with WP routings on competition with the merged system. The IRA would therefore have allowed DRGW to quote its own rates from Kansas City to Northern California while, because of its trackage rights on the UP system, providing service between Utah and Kansas City. DRGW contends that the IRA was "designed to offset the merged system's domination of Utah junction traffic and provide what would be, in effect, independent competition to the monopolistic control exerted by UP in the central corridor." Brief for Petitioner DRGW at 20. By allowing the DRGW to offer competitive rates for shipments pass-[33] ing through the Utah junctions without advance WP concurrence, "the previous competitive rate environment at Utah junctions" would be preserved because DRGW could offer "an independent alternative to the UP in the central corridor." *Id.* at 21. Basically, DRGW fears that without this IRA it will be foreclosed from participating in California traffic because UP will favor WP while SP will shift to its long haul southern routes. Alternately, DRGW fears that SP will arrive at a collusive accommodation with UP in Utah to share California traffic. The Commission found that granting DRGW the rate making authority would enable it to attract California

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[11] The UP system, however, would be guaranteed revenue calculated on the basis of WP divisions of revenue according to the higher of the UP or DRGW formulas as of the date the merger proposal was submitted to the Commission.

traffic itself, thus reducing DRGW's incentive to work with SP, its western interchange partner. This would weaken the new SP/DRGW line, which the Commission was relying on to provide competition in the central corridor. 366 I.C.C. at 578-79.

This reasoning does not satisfy our central concerns. Granting the IRA would have an effect that the Commission's opinion simply does not address—namely, it would create a third transcontinental route over SP from St. Louis to Kansas City, DRGW from Kansas City to Utah and from Utah to Northern California on the WP. Assuming that WP's lines provide a strong route to California, this third route would seem to be a good alternative to the merged system. If the WP lines are inadequate to serve the Utah-Northern California traffic, SP's competing line (the gathering area of which impressed the ICC) would be a sufficiently viable and strong competitor with WP to force DRGW to deal with SP. Moreover, given SP's southern corridor, which is certainly capable of handling transcontinental traffic, DRGW may need the "leverage" afforded by an independent route to the West Coast in order to induce SP participation in the central corridor route.

In short, if WP's lines are good enough to serve California, the Commission has not adequately explained why [34] the IRA should not be granted to create a third transcontinental central route. If, on the other hand, the WP lines are not good enough to create such a route, the Commission's theory—that DRGW would have a reduced incentive to deal with SP—is undercut by the competitive advantage SP's lines have over those of WP. Given these unanswered questions, we remand the decision as to the requested IRA to the ICC for further consideration and explanation.

5. *The Labor Issues*

Petitioners ATDA and BMWE challenge the Commission's denial of their requests that the *New York Dock*

conditions imposed on the applicant carriers be extended to protect the interests of the employees of non-applicant carriers. ATDA also challenges the Commission's refusal to impose two specific conditions over and above those outlined in *New York Dock*. These proposed conditions would require the Commission to approve, after notice and opportunity for a hearing, any changes in the form of UPC's corporate control over MPC and WP and any transfer of MPC or WP train dispatching work or train dispatchers. We have fully considered petitioners' arguments and conclude that the Commission properly denied their requests.

Petitioners' first argument—that 49 U.S.C. §§ 11344 (b) (1) (D) and 11347 require the Commission to protect the interests of all affected railroad employees—has been recently considered and rejected by this court. *See Lamoille Valley R.R. v. ICC*, 711 F.2d 295, 323-24 (D.C. Cir. 1983). We see no need at this point to add to the thorough discussion of that opinion nor do we find any different result warranted.

The Commission's refusal to impose the two specific conditions also was proper. First, ATDA is concerned that, unless the Commission were to require notice and [35] opportunity for a hearing prior to allowing a change in the form of UPC's corporate control over MPC and WP, the affected employees would not have an effective right to be heard with respect to protection above the minimum level outlined in *New York Dock* until after consumation of the transaction. *See* 49 C.F.R. § 1180.4 (g) (1983). The Commission's power to allow changes in the corporate form of a carrier is set out at 49 U.S.C. § 10505 (Supp. V 1981). That section allows the Commission to exempt a carrier's change in corporate form from many requirements of the Interstate Commerce Act, but it specifically forbids the Commission "to relieve a carrier of its obligation to protect the interests of employees as required by [the Interstate Commerce Act]." *Id.* § 10505

(g)(2). Thus, regardless of whether the employees are entitled to complain before or after the transaction occurs, they are entitled to complain if the labor protective conditions imposed are not sufficient, making imposition of ATDA's first condition unnecessary.

Second, ATDA is concerned that, unless the Commission were to require notice and opportunity for a hearing prior to allowing UPC to transfer WP and MPC train dispatching work or train dispatchers, the interests of the affected train dispatchers would not be adequately considered. The Commission concluded that, "in the event employees might be impacted in the future, . . . they will be afforded the protections [i.e., the *New York Dock* conditions] we imposed here." *UPC-Control*, 366 I.C.C. at 622. This conclusion is consistent with this court's decision in *American Train Dispatchers Association v. ICC*, 671 F.2d 580 (D.C. Cir. 1982). Moreover, it is supported by the Commission's findings that there is no evidence in the record that transfers of work or dispatchers are contemplated and that requiring a hearing would be "unduly burdensome" and would "fetter applicants' operating capabilities." The Commission's refusal to impose this condition is not arbitrary or capricious.

[36] 6. *The Fairness of the Terms of the Consolidation*

Petitioner Edward K. Wheeler, a minority shareholder of WP Class A common stock, objects to the finding of the Commission that the terms of the consolidation with respect to the interests of minority shareholders are "fair and reasonable" as required by the Act. *See* 49 U.S.C. § 11344; *Schwabacher v. United States*, 334 U.S. 182, 201 (1948) (the Commission "is under a duty to see that minority interests are protected, especially when there is an absence of arm's length bargaining or the terms of the merger have been imposed by management interests adverse to any class of stockholders"). He contends that the $20 per share purchase price offered by UPC to WP

stockholders is unreasonably low because that price fails to reflect WP's industrial land holdings and, more importantly, fails to reflect the benefits that will accrue to UPC as a result of its consolidation with WP. Petitioner Wheeler does not ask that we set aside the Commission's approval of the consolidation. He only requests that we remand the question of the valuation of WP stock back to the Commission for further consideration. We conclude, however, that the Commission's methodology of valuation is reasonable and that its conclusions are supported by substantial evidence in the record.

First, contrary to Wheeler's principal complaint, the Commission explicitly took into account the enhanced value of WP stock as a result of the consolidation. *See UPC-Control*, 366 I.C.C. at 636-38. It calculated the difference in the market value of WP stock immediately prior to UPC's tender offer and the present value of the stock in light of the consolidation, describing that difference in value as "the merger premium." The Commission then allocated a variable share of the merger premium to WP shareholders, concluding that the resulting amounts added to the market value of the WP stock before the tender offer would yield a range of reasonable prices from $16.85 per share to $26.25 per share. Be-
[37] cause the $20 per share to be paid by UPC under the terms of the consolidation falls within this range, the Commission found that price to be fair and reasonable.

Petitioner Wheeler attacks the Commission's conclusion on the ground that the studies relied upon by the WP management in accepting UPC's terms for consolidation were flawed. Wheeler also contends that the Commission erred in finding that UPC's offer was the result of arm's length negotiations. These contentions, however, are unavailing. First, the Commission did not simply rely upon the judgments of WP's financial experts in determining the fairness of the consolidation terms, although it did consider those judgments. Rather, the Commission found

that the $20 per share price for WP stock was fair on the basis of its own independent analysis. Second, there exists substantial record evidence to support the Commission's finding of arm's length negotiations between WP and UPC. WP was assisted in the negotiations by an independent investment banking firm, Solomon Brothers, which advised WP that $20 per share was a fair price for its stock.[12] Moreover, this price was approved by WP's Board of Directors in light of Solomon Brothers' advice.

Finally, petitioner Wheeler contends that the Commission unreasonably disregarded WP's industrial landholdings in determining the fairness of UPC's tender offer. But contrary to Wheeler's assertions, the Commission did not simply disregard WP's landholdings. Rather, it stated that such holdings are relatively unimportant in the context of the methodology the Commission used in determinig [sic] a reasonable range of prices for WP's stock. Because WP is a going concern, the Commission determined that the value of its stock can best be measured by WP's earning [38] power as reflected by performance in the stock market rather than the book value of the company. *Cf. Seaboard World Airlines, Inc. v. Tiger International, Inc.*, 600 F.2d 355, 361-62 (2d Cir. 1979); *Mills v. Electric Auto-Lite Co.*, 552 F.2d 1239, 1247-49 (7th Cir. 1977). Using the stock market as a guide in ascertaining value, $20 per share for WP's stock represented a 38 percent premium over the $14.50 WP's stock sold for the day before the public announcement of the tender offer. It is true that the Commission's discussion of this issue is unduly condensed. *See UPC-Control*, 366 I.C.C. at 636. Nonetheless, the Commission's approval of UPC's tender offer meets the deferential standards of review applicable in this context. "[A]lthough the Com-

[12] UPC did not seek outside advice with respect to the fairness of its offer to UPC stockholders. UPC claims that it did not obtain such advice because of the relatively small size of the transaction. *See UPC-Control, supra* note 2, 366 ICC at 635.

mission in fulfilling its statutory responsibilities is to carefully review all of the terms of a merger proposal and determine whether they are just and reasonable, it is not for the agency, much less the courts, to dictate the terms of the merger agreement once this standard has been met." *Northern Lines Merger Cases*, 396 U.S. at 520.

Therefore, we affirm the decision of the Commission to approve this merger and remand the case for reconsideration of DRGW's request for independent ratemaking authority.

So ordered.

APPENDIX B

Served October 20, 1982

F-9932

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET No. 30,000

UNION PACIFIC CORPORATON,
PACFIC RAIL SYSTEM, INC., AND UNION
PACIFIC RAILROAD COMPANY-CONTROL—
MISSOURI PACIFIC CORPORATION AND
MISSOURI PACIFIC RAILROAD COMPANY

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[462] FINANCE DOCKET NO. 30,000 [1]

UNION PACIFIC CORPORATION, PACIFIC RAIL SYSTEM, INC., AND UNION PACIFIC RAILROAD COMPANY—CONTROL—MISSOURI PACIFIC CORPORATION AND MISSOURI PACIFIC RAILROAD COMPANY

Decided September 24, 1982

[1] This decision embraces Finance Docket No. 30,000 (Sub-No. 1), Union Pacific Corporation, Pacific Rail System, Inc., and Union Pacific Railroad Company-Control-The Western Pacific Railroad Company; Finance Docket No. 30,000 (Sub-No. 2), Application of Union Pacific Corporation Under 49 U.S.C. § 11301 for Authority to Issue Securities; Finance Docket No. 30,000 (Sub-No. 3), Application of Missouri Pacific Corporation Under 49 U.S.C. § 11301 for Authority to Issue Securities; Finance Docket No. 30,000 (Sub-No. 4), Application of Western Pacific Railroad Company Under 49 U.S.C. § 11301 for Authority to Issue Securities; Finance Docket No. 30,000 (Sub-No. 5), Union Pacific Railroad Company-Trackage Rights at Kansas City over-Missouri Pacific Railroad Company; Finance Docket No. 30,000 (Sub-No. 6), Union Pacific Railroad Company-Trackage Rights at St. Joseph over-Missouri Pacific Railroad Company; Finance Docket No. 30,000 (Sub-No. 7), Missouri Pacific Railroad Company-Trackage Rights at Omaha-Council Bluffs over-Union Pacific Railroad Company; Finance Docket No. 30,000 (Sub-No. 8), Union Pacific Railroad Company and Missouri Pacific Railroad Company-Pooling between Omaha-Council Bluffs and Kansas City; Finance Docket No. 30,000 (Sub-No. 9), Union Pacific Railroad Company and Missouri Pacific Railroad Company-Pooling Between Beloit and Salina, Kansas; Finance Docket No. 30,000 (Sub-No. 10), Union Pacific Railroad Company and Missouri Pacific Railroad Company-Pooling between Lincoln and Kansas City; Docket No. MC-F-14448, Union Pacific Corporation, Pacific Rail System, Inc., and Union Pacific Railroad Company-control-WPX Freight System, Inc.; Docket No. MC-F-14449, Union Pacific Corporation, Pacific Rail System, Inc., and Union Pacific Railroad Company-Control-Missouri Pacific Truck Lines, Inc.; Finance Docket No. 30,000 (Sub-No. 14), Southern Pacific Transportation

[463]

1. In Finance Docket No. 30,000, acquisition of control by Union Pacific Corporation, Union Pacific Railroad Company, and Pacific Rail System, Inc., of

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Company, St. Louis Southwestern Railway Company-Trackage Rights-Union Pacific Rilroad Company-Ogden to Omaha/Council Bluffs; Gibbon to Topeka; Finance Docket No. 30,000 (Sub-No. 15), Southern Pacific Transportation Company, St. Louis Southwestern Railway Company-Trackage Rights-Union Pacific Railroad Company-Ogden to Omaha/Council Bluffs; Gibbon to Topeka; Finance Docket No. 30,000 (Sub-No. 16), St. Louis Southwestern Railway Company-Trackage Rights-Missouri Pacific Railroad Company-Kansas City to St. Louis; Finance Docket No. 30,000 (Sub-No. 17), St. Louis Southwestern Railway Company-Trackage Rights-Atchison, Topeka and Santa Fe Railway Company Utilized By Missouri Pacific-Vicinity of Kansas City; Finance Docket No. 30,000 (Sub-No. 18), Denver and Rio Grande Western Railroad Company-Trackage Rights-Missouri Pacific Railroad Company Between Pueblo, CO and Kansas City, MO; Finance Docket No. 30,000 (Sub-No. 19), Denver and Rio Grande Western Railroad Company-Trackage Rights-Western Pacific Railroad Company Between Salt Lake City, UT and points in Utah, Nevada and California; Finance Docket No. 30,000 (Sub-No. 20), Missouri-Kansas-Texas Railroad Company-Trackage Rights-Missouri Pacific Railroad Company-Between Sedalia and St. Louis, MO; Finance Docket No. 30,000 (Sub-No. 21), Missouri Kansas Texas Railroad Company-Trackage Rights-Missouri Pacific Railroad Company-Between San Antonio and Laredo, TX; Finance Docket No. 30,000 (Sub-No. 22), Missouri Kansas-Texas Railroad Company Use of Terminal Facilities at Laredo, TX; Finance Docket No. 30,000 (Sub-No. 23), Missouri-Kansas-Texas Railroad Company-Trackage Rights-Missouri Pacific Railroad Company-Between San Antonio and Corpus Christi, TX; Finance Docket No. 30,000 (Sub-No. 24), Missouri-Kansas-Texas Railroad Company Use of Terminal Facilities at Corpus Christi, TX; Finance Docket No. 30,000 (Sub-No. 25), Missouri-Kansas-Texas Railroad Company-Trackage Rights-Missouri Pacific Railroad Company-Between Kansas City, KS and Omaha, NE; Finance Docket No. 30,000 (Sub-No. 26), Missouri-Kansas-Texas Railroad Company-Trackage Rights-Missouri Pacific Railroad Company-Between Union and Lincoln, NE; Finance Docket No. 30,000 (Sub-No. 27), Missouri-Kansas-Texas Railroad Company Use of Terminal Facilities at Lincoln, NE; Finance Docket No. 30,000 (Sub-No. 28), Missouri-Kansas-Texas Railroad Company Use of Terminal Facilities at Atchison, KS; Finance Docket No. 30,000 (Sub-No. 29), Missouri-Kansas-Texas Railroad Company-Trackage Rights-Union

Missouri Pacific Corporation, and of Missouri Pacific Railroad Company and its rail carrier subsidiaries, is authorized, subject to conditions.

2. In Finance Docket No. 30,000 (Sub-No. 1), acquisition of control by Union Pacific Corporation, Union

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Pacific Railroad Company-Between Omaha, NE, and Council Bluffs, IA; Finance Docket No. 30,000 (Sub-No. 30), Missouri-Kansas-Texas Railroad Company Use of Terminal Facilities at Council Bluffs, IA; Finance Docket No. 30,000 (Sub-No. 31), Missouri-Kansas-Texas Railroad Company-Trackage Rights-Union Pacific Railroad Company-Between Kansas City and Topeka, KS; Finance Docket No. 30,000 (Sub-No. 32), Missouri-Kansas-Texas Railroad Company Use of Terminal Facilities at Topeka, KS; Finance Docket No. 30,000 (Sub-No. 33), Missouri-Kansas-Texas Railroad Company-Trackage Rights-Terminal Railroad Association of St. Louis; Finance Docket No. 30,000 (Sub-No. 34), Kansas City Southern Railway Company and Louisiana & Arkansas Railway Company-Acquisition and Trackage Rights over-Missouri Pacific Railroad Company in LA, TX, AR, and IL; Finance Docket No. 30,000 (Sub-No. 35), Chicago and North Western Transportation Company-Trackage Rights-Union Pacific Railroad Company and Missouri Pacific Railroad Company; Finance Docket No. 30,000 (Sub-No. 36), Burlington Northern Railroad Company-Trackage Rights-Missouri Pacific Railroad Company Between Claremore, OK and Oologah, OK; Finance Docket No. 30,000 (Sub-No. 37), Burlington Northern Railroad Company-Trackage Rights-Missouri Pacific Railroad Company Between Falls City, NE and Kansas City, KS; Finance Docket No. 30,000 (Sub-No. 38), Burlington Northern Railroad Company-Trackage Rights-Missouri Pacific Railroad Company-Between Thebes and West Vienna, IL; Finance Docket No. 30,000 (Sub-No. 39), Burlington Northern Railroad Company-Trackage Rights-Missouri Pacific Railroad Company Between Claremore, OK and Fort Gibson, OK; Finance Docket No. 30,000 (Sub-No. 40), Burlington Northern Railroad Company-Trackage Rights-Missouri Pacific Railroad Company Between Hoxie, AR and White Bluff, AR; Finance Docket No. 30,000 (Sub-No. 41), Burlington Northern Railroad Company-Trackage Rights-Missouri Pacific Railroad Company Between Hoxie and Newark, AR; Finance Docket No. 30,000 (Sub-No. 42), Burlington Northern Railroad Company-Trackage Rights-Union Pacific Railroad Company Between Hastings, NE and Ogden, UT; and Finance Docket No. 30,000 (Sub-No. 43), Chicago and North Western Transportation Company and Missouri Pacific Railroad Company-Pooling Agreement.

Pacific Railroad Company, Pacific Rail System, Inc., and Pacific Subsidiary, Inc., of Western Pacific Railroad Company and its rail carrier subsidiaries, is authorized, subject to conditions.

3. In Finance Docket No. 30,000 (Sub-No. 2), issuance of common stock and $7.50 per share convertible preferred stock by Union Pacific Corporation is authorized.

4. In Finance Docket No. 30,000 (Sub-No. 3), issuance of common stock by Missouri Pacific Corporation is authorized.

5. In Finance Docket No. 30,000 (Sub-No. 4), issuance of common stock by Western Pacific Railroad Company is authorized.

6. In Finance Docket No. 30,000 (Sub-No. 5), the application of Union Pacific Railroad Company for trackage rights over the Missouri Pacific Railroad Company at Kansas City is granted, subject to conditions.

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7. In Finance Docket No. 30,000 (Sub-No. 6), the application of Union Pacific Railroad Company for trackage rights over the Missouri Pacific Railroad Company at St. Joseph, MO, is granted, subject to conditions.

8. In Finance Docket No. 30,000 (Sub-No. 7), the application of Missouri Pacific Railroad Company for trackage rights over the Union Pacific Railroad Company at Omaha, NE/Council Bluffs, IA, is granted, subject to conditions.

9. In Finance Docket No. 30,000 (Sub-No. 8), the application of Union Pacific Railroad Company and Missouri Pacific Railroad Company to conduct pooling operations between Omaha, NE/Council Bluffs, IA, and Kansas City, MO, is dismissed.

10. In Finance Docket No. 30,000 (Sub-No. 9), the application of Union Pacific Railroad Company and Missouri Pacific Railroad Company to conduct pooling operations between Beloit and Salina, KS, is dismissed.

11. In Finance Docket No. 30,000 (Sub-No. 10), the application of Union Pacific Railroad Company and Missouri Pacific Railroad Company to conduct pooling operations between Lincoln, NE, and Kansas City, MO, is dismissed.

12. In No. MC-F-14448, acquisition of control by Union Pacific Corporation, Union Pacific Railroad Company, and Pacific Rail Systems, Inc., of WPX Freight Systems, Inc., is authorized.

13. In No. MC-F-14449, acquisition of control by Union Pacific Corporation, Union Pacific Railroad Company, and Pacific Rail System, Inc., of Missouri Pacific Truck Lines, Inc., is authorized.

14. In Finance Docket No. 30,000 (Sub-No. 14), the application of Southern Pacific Transportation Company and St. Louis Southwestern Railway Company for trackage rights over the Union Pacific Railroad Company between Ogden, UT, and Omaha, NE/ Council Bluffs, IA, and between Gibbon, NE, and Topeka, KS, is denied.

15. In Finance Docket No. 30,000 (Sub-No. 15), the application of Southern Pacific Transportation Company and St. Louis Southwestern Railway Company for trackage rights over the Union Pacific Railroad Company between Ogden, UT, and Omaha, NE/ Council Bluffs, IA, and between Gibbon, NE, and Topeka, KS, is denied.

16. In Finance Docket No. 30,000 (Sub-No. 16), the application of St. Louis Southwestern Railway Company for trackage rights over the Missouri Pacific

Railroad Company between Kansas City, MO, and St. Louis, MO, is granted, subject to conditions.

17. In Finance Docket No. 30,000 (Sub-No. 17), the application of St. Louis Southwestern Railway Company for trackage rights over the line segments of the Atchison, Topeka and Santa Fe Railway Company utilized by the Missouri Pacific Railroad Company in the vicinity of Kansas City Between Eton and Congo, MO, is granted, subject to conditions.

18. In Finance Docket No. 30,000 (Sub-No. 18), the application of Denver and Rio Grande Western Railroad Company for trackage rights over the Missouri Pacific Railroad Company between Pueblo, CO, and Kansas City, MO, is granted, subject to conditions.

19. In Finance Docket No. 30,000 (Sub-No. 19), the application of the Denver and Rio Grande Western Railroad Company for trackage rights over the Western Pacific Railroad Company and its rail carrier subsidiaries between Salt Lake City, UT, and points in Utah, Nevada, and California, is dismissed.

20. In Finance Docket No. 30,000 (Sub-No. 20), the application of Missouri-Kansas-Texas Railroad Company for trackage rights over the Missouri Pacific Railroad Company between Sedalia, and St. Louis, MO, is denied.

21. In Finance Docket No. 30,000 (Sub-No. 21), the application of Missouri-Kansas-Texas Railroad Company for trackage rights over the Missouri Pacific Railroad Company between San Antonio and Laredo, TX, is denied.

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22. In Finance Docket No. 30,000 (Sub-No. 22), the application of Missouri-Kansas-Texas Railroad Company for acquisition of use of terminal facilities at Laredo, TX, is denied.

23. In Finance Docket No. 30,000 (Sub-No. 23), the application of Missouri-Kansas-Texas Railroad Com-

pany for trackage rights over the Missouri Pacific Railroad Company between San Antonio and Corpus Christi, TX, is denied.

24. In Finance Docket No. 30,000 (Sub-No. 24), the application of Missouri-Kansas-Texas Railroad Company for acquisition of use of terminal facilities at Corpus Christi, TX, is denied.

25. In Finance Docket No. 30,000 (Sub-No. 25), the application of Missouri-Kansas-Texas Railroad Company for trackage rights over the Missouri Pacific Railroad Company between Kansas City, MO, and Omaha, NE, is granted, subject to conditions.

26. In Finance Docket No. 30,000 (Sub-No. 26), the application of Missouri-Kansas-Texas Railroad Company for trackage rights over the Missouri Pacific Railroad Company between Union and Lincoln, NE, is granted, subject to conditions.

27. In Finance Docket No. 30,000 (Sub-No. 27), the application of Missouri-Kansas-Texas Railroad Company for acquisition of use of terminal facilities at Lincoln, NE, is granted.

28. In Finance Docket No. 30,000 (Sub-No. 28), the application of Missouri-Kansas-Texas Railroad Company for acquisition of use of terminal facilities at Atchison, KS, is granted.

29. In Finance Docket No. 30,000 (Sub-No. 29), the application of Missouri-Kansas-Texas Railroad Company for trackage rights over the Union Pacific Railroad Company between Omaha, NE, and Council Bluffs, IA, is granted, subject to conditions.

30. In Finance Docket No. 30,000 (Sub-No. 30), the application of Missouri-Kansas-Texas Railroad Company for acquisition of use of terminal facilities at Council Bluffs, IA, is granted.

31. In Finance Docket No. 30,000 (Sub-No. 31), the application of Missouri-Kansas-Texas Railroad Com-

pany for trackage rights over the Union Pacific Railroad Company between Kansas City and Topeka, is granted, subject to conditions.

32. In Finance Docket No. 30,000 (Sub-No. 32), the application of Missouri-Kansas-Texas Railroad Company for acquisition of use of terminal facilities at Topeka, KS, is granted.

33. In Finance Docket No. 30,000 (Sub-No. 33), the application of Missouri-Kansas-Texas Railroad Company for trackage rights over the Terminal Railroad Association of St. Louis, in St. Louis, MO, is denied.

34. In Finance Docket No. 30,000 (Sub-No. 34), the application of Kansas City Southern Railroad Company and Louisiana & Arkansas Railway Company for acquisition of lines of, and trackage rights over, Missouri Pacific Railroad Company in Louisiana, Texas, Arkansas, Missouri, and Illinois, is denied.

35. In Finance Docket No. 30,000 (Sub-No. 35), the application of Chicago and North Western Transportation Company for trackage rights over the Union Pacific Railroad Company and the Missouri Pacific Railroad Company, is dismissed.

36. In Finance Docket No. 30,000 (Sub-No. 36), the application of Burlington Northern Railroad Company for trackage rights over the Missouri Pacific Railroad Company between Claremore and Oologah, OK, is denied.

37. In Finance Docket No. 30,000 (Sub-No. 37), the application of Burlington Northern Railroad Company, for trackage rights over the Missouri Pacific Railroad Company between Falls City, NE, and Kansas City, KS, is denied.

38. In Finance Docket No. 30,000 (Sub-No. 38), the application of Burlington Northern Railroad Company for trackage rights over the Missouri Pacific Railroad Company between Thebes and West Vienna, IL, is dismissed.

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39. In Finance Docket No. 30,000 (Sub-No. 39), the application of Burlington Northern Railroad Company, for trackage rights over the Missouri Pacific Railroad Company between Claremore and Fort Gibson, OK, is denied.

40. In Finance Docket No. 30,000 (Sub-No. 40), the application of Burlington Northern Railroad Company, for trackage rights over the Missouri Pacific Railroad Company between Hoxie and White Bluff, AR, is denied.

41. In Finance Docket No. 30,000 (Sub-No. 41), the application of Burlington Northern Railroad Company, for trackage rights over the Missouri Pacific Railroad Company between Hoxie and Newark, AR, is denied.

42. In Finance Docket No. 30,000 (Sub-No. 42), the application of Burlington Northern Railroad Company, for trackage rights over the Union Pacific Railroad Company between Hastings, NE, and Ogden, UT, is dismissed.

43. In Finance Docket No. 30,000 (Sub-No. 43), the application of Chicago and North Western Transportation Company and Missouri Pacific Railroad Company to conduct pooling operations between Omaha, NE/Council Bluffs, IA, and Kansas City, MO, is approved.

William J. McDonald, C. Barry Schaefer, William P. Higgins, Paul A. Conley, Jr., Charles A. Miller, S. William Livingston, Jr., Stuart C. Stock, Eugene D. Gulland, Joanne B. Grossman, J. Michael Hemmer, Gregg H. Levy, Arvid E. Roach II, Forrest N. Krutter, Mark Kalafut, and *Steven J. Rosenbaum,* for Union Pacific Corporation, Pacific Rail System, Inc., and Union Pacific Railroad Company.

Mark M. Hennelly, M. Lauck Walton, John K. Hendricks, Gary S. Jacobson, Joseph J. Gazzoli, and *Gabrielle V. Albans,* for Missouri Pacific Corporation and Missouri Pacific Railroad Company.

Walter G. Treanor and *Eugene J. Toler,* for The Western Pacific Railroad Company.

Paul L. Mills, John C. Chernauskas, and *Ronald K. Silver,* for United States Department of Agriculture.

Gordon P. MacDougall, for American Train Dispatchers Association *R. K. Knowlton, Milton E. Nelson, Jr., Michael W. Blazsak, Dennis W. Wilson, Ellen Lubarsky,* and *Robert R. Cowell,* for The Atchison, Topeka and Santa Fe Railway Company.

Richard H. Kraushar, for Brotherhood of Locomotive Engineers *Richard Hirn,* for Brotherhood of Railway Carmen of the United States and Canada, International Brotherhood of Electrical Workers, International Brotherhood of Firemen and Oilers, and Sheetmetal Workers International Association.

Jon C. Hansen, for The Board of Trade of Kansas City, Missouri, Inc.

Frank S. Farrell, Donald E. Engle, Nicholas P. Moros, Charles H. White, Jr., Douglas J. Babb, James R. Walker, Donal L. Turkal, and *Megan K. Ricke* for Burlington Northern Railroad Company.

[467] *Vincent V. MacKenzie* and *O. J. Solander, for* People of the State of California, State Department of Transportation, and the Public Utilities Commission of the State of California.

Louis T. Duerinck, Stuart F. Gassner, Fritz R. Kahn, William C. Evans, Robert R. Brinker, Lisa Vogel, and *L. John Osborn,* for Chicago and North Western Transportation Company.

Raymond K. Merrill, William L. Phillips, and *William C. Sippel,* for Richard B. Ogilvie, Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor.

Barbara W. Mather, Richard M. Rindler, Charles N. Marshall, and Charles E. Mechem, for Consolidated Rail Corporation.

Samuel R. Freeman, Kendall T. Sanford, John H. Caldwell, John G. DeGooyer, and *Denise M. O'Brien,* for The Denver and Rio Grande Western Railroad Company.

Howard D. Koontz, for Illinois Central Gulf Railroad.

James R. Weiss, Richard A. Feinstein, Harriet R. Brumberg, and *Miles B. Rittmaster,* for The United States Department of Justice.

Steve Botts, for Energy and Environmental Branch, Interstate Commerce Commission.

Dan Watkins, David Tittsworth, and *Tom Green,* for the State of Kansas and Kansas Department of Transportation.

Joseph Auerbach, Morris Raker, Harvey E. Bines, William P. Stimson, Paul L. Criswell, Katherine J. Ross, Frank J. Bailey, Phillip S. Brown, Robert K. Dreiling, David M. Schwartz, Robert L. Calhoun, Alexander A. Notopolous, Jr., and *Paulette S. Kessler,* for The Kansas City Southern Railway Company and Louisiana & Arkansas Railway Company.

William A. Thie, Eldon S. Olson, Harry G. Silleck, Jr., Michael E. Roper, Richard H. Streeter, and *John L. Altieri, Jr.,* for Missouri-Kansas-Texas Railroad Company.

Edward J. Schack, James A. Clark, Martin L. Schwimmer, and *Karen A. Nappo,* for Office of Special Counsel, Interstate Commerce Commission.

Herbert A. Waterman, W. Harney Wilson, Douglas E. Stephenson, Michael A. Smith, Julian O. VonKalinowski, Robert E. Cooper, Peter Sullivan, Richard L. Dashefsky, and *Mitchell C. Tilner,* for Southern Pacific Transportation Company and St. Louis Southwestern Railway Company *Hugh L. McCulley,* for The Texas-Mexican Railway Company.

John M. Fowler, Diane R. Liff, Mary Bennett Reed, and *Cleveland Thornton,* for United States Department of Transportation.

John O'B. Clarke, Jr., Clinton J. Miller, III, Charles A. Spitulnik, Joseph Guerrieri, and *John J. Sullivan,* for Brotherhood of Maintenance of Way Employees, Brotherhood of Railroad Signalmen, Brotherhood of Railway and Airline Clerks, International Association of Machinists and [468] Aerospace Workers, and United Transportation Union (Various Labor Organizations).

Jerome M. Alper, for Water Transport Association

Daniel A. Bruno, pro se

William R. Wesson, Anne G. Wesson, and *John Charles Vaiani, pro se Edward K. Wheeler, pro se*

DECISION

BY THE COMMISSION

SYLLABUS

The primary applications seek authority for Union Pacific Corporation (UPC), and certain subsidiaries, to acquire and exercise control over Missouri Pacific Corporation (MPC) and its carrier subsidiaries, and over Western Pacific Railroad Company (WPRR) and its carrier subsidiaries. Under the proposed transactions all of the involved existing railroads and holding companies will retain their separate corporate identities, but will be un-

der the control of UPC and a new railroad holding company, Pacific Rail System, Inc. (PRSI).

Responsive applications seeking trackage rights were filed by protestants Southern Pacific Transportation Company, jointly with St. Louis Southwestern Railway Company (collectively SP); Denver & Rio Grande Western Railroad Company (DRGW); Missouri-Kansas-Texas Railroad Company (MKT); Kansas City Southern Railway Company, jointly with Louisiana & Arkansas Railway Co. (collectively KCS); Chicago and North Western Transportation Company (CNW); and Burlington Northern Railroad Company (BN). CNW has settled with applicants and withdrew its responsive applications. Applicants and CNW have filed an application seeking approval of a pooling agreement entered into pursuant to their settlement, as well as other terms of the settlement. Atchison, Topeka, and Santa Fe Railway Company (ATSF) opposes the transactions, but does not seek imposition of any conditions. The Department of Justice, the Department of Transportation, other State and Federal agencies, labor organizations, and other railroads participated in the proceedings.

In considering a consolidation application, we are required to weigh the public benefits of the proposed transaction against any harmful impacts. We are approving the primary applications, subject to conditions, because we conclude that the proposed transactions will produce public benefits. In addition, we expect that the proposed transactions will produce significant financial benefits for the consolidating carriers. These [469] private benefits, however, were not considered in our required analysis of public benefits.

The public benefits of the proposed transactions generally consist of reduced transportation costs and improved service. These will be achieved through staff and facility consolidations at common points (particularly at

Kansas City and St. Joseph, MO); more efficient use of equipment resulting in fuel and maintenance savings; consolidation of the carriers' marketing departments; and more efficient service through traffic rerouting within the consolidated system, added run-through trains, and improved blocking. A significant though less tangible benefit also will be realized by providing single system service to shippers served by the three consolidating carriers.

The transactions will result in adverse impacts on competition in some markets, especially for central corridor transcontinental traffic and for grain shipments between the Midwest and the Gulf Coast via Kansas City. Unconditioned approval might also threaten the ability of SP and MKT to provide essential rail service. These effects have been reduced by our decision to grant certain applications for trackage rights over some portions of the consolidated system.

We are addressing the anticompetitive impact of the proposed transactions in the transcontinental market by granting the application of the DRGW for trackage rights between Pueblo, CO and Kansas City, and the application of SP for trackage rights between Kansas City and St. Louis. Taken together, these trackage rights will encourage development of a new SP-DRGW-SP route between the West Coast, Kansas City and the St. Louis gateway that should provide a competitive alternative in the central corridor for transcontinental shippers. The southern routing available to SP over the Tucumcari line will also benefit. We also approve a rate condition voluntarily agreed upon by the UP and CNW that will retain competitive transcontinental routes via the CNW where such routes are cost efficient.

We address the expected loss of competition for grain traffic moving from Omaha and other grain gathering centers in the Midwest to the Gulf Coast via the Kansas

City gateway by approving the MKT application for trackage rights between Kansas City and Omaha and Council Bluffs, IA, Lincoln, NE, and Topeka, KS. These trackage rights will permit the MKT to serve terminal elevators directly and thereby to retain the competitive service heretofore provided by the UP-MKT joint line route. (The UP is expected to favor MP over MKT for traffic interchanged at Kansas City and destined for the Gulf Coast.)

The possible threat to essential services offered by SP and MKT will be eliminated as a byproduct of the trackage rights granted to those carriers [470] to offset the anticompetitive effects of the consolidation. An incidental effect of those trackage rights will be to neutralize substantially the financial impact of the proposed transactions on SP and MKT. The grant of trackage rights over the MP between Kansas City and St. Louis to the SP will permit the SP to avoid a significant capital outlay to rehabilitate its recently acquired route between Kansas City and St. Louis over the Rock Island line. This will produce a stream of savings that should offset the loss of net income to the SP from present SP traffic that will be diverted to the consolidated system. The trackage rights granted to the MKT will permit it to remain competitive in the Midwest grain market and to offset the net income it will lose through the diversion of UP originated traffic to the MP at Kansas City.

The proposed transactions present no other significant competitive problems in any transportation markets, including coal transportation markets, and will not harm essential services. Therefore, no other responsive applications by opposing parties will be granted.

Upon reaching our conclusion that the proposed transaction would be in the public interest, we confront a number of additional issues, as follows.

Pacific Railroad Acts

We conclude that the Pacific Railroad Acts of 1862 and 1864 do not prevent our approval of the UP-WP consolidation. Regardless of whether that consolidation would violate those Acts, our plenary jurisdiction over railroad consolidations allows approval of the transactions notwithstanding any requirements of law other than those found in the Interstate Commerce Act.

CNW Settlement

CNW and MP sought approval of a pooling agreement between Omaha and Kansas City which CNW entered into in lieu of the responsive trackage rights application it had filed. Applicants and CNW also sought approval of the traffic and rate conditions in their settlement so that those agreements will have antitrust immunity. The pooling agreement will promote more efficient and economical service and will not unduly restrain competition. Therefore, it will be approved. We also approve the rate provision of the settlement agreement. That provision is consistent with the public interest and will be implemented more effectively if it is specifically approved and immunized from the antitrust laws. We take no action on the other terms of the settlement.

[471] *Bieber Conditions*

Consummation of the proposed consolidations will cause the "Bieber" conditions imposed in *Great Northern Pac.-Merger-Great Northern*, 331 I.C.C. 228 (1967) (*Northern Lines*) to be no longer in the public interest. Those conditions, therefore, will be removed.

Securities Transactions

The terms of the proposed transactions are fair and reasonable. The financial terms are consistent with the public interest and adequately protect the interests of shareholders. The proposed security issuances satisfy the statutory criteria and are approved.

Labor Issues

Our public interest analysis includes consideration of the effects of the proposed transactions on the interests of railroad employees. The primary transactions will be subject to our usual labor protection conditions for railroad consolidations. The approved responsive applications and the pooling agreement will be subject to our usual labor protection conditions imposed in trackage rights application proceedings. Subject to these conditions, approval of the primary applications, the pooling agreement, and the imposed trackage rights will be consistent with the public interest insofar as they affect railroad labor. No other labor protection conditions will be imposed.

Energy and Environment

The primary transactions and the approved responsive applications present no energy consumption or significant environmental impact problems. We are imposing two minor environmental conditions on the UP-MP consolidation.

No need has been shown for any other conditions proposed by any party. Therefore all requests for relief, other than those set forth above, are denied.

INTRODUCTION

On September 15, 1980, Union Pacific Corporation, Pacific Rail System, Inc., and Union Pacific Railroad Company, and Missouri Pacific Corporation and Missouri Pacific Railroad Company jointly filed an application under 49 U.S.C. 11343 and 11344 seeking authority for UPC to control MPC.[2] On the same date, UP and the Western Pacific Railroad Company jointly filed an application under 49 U.S.C. 11343 and 11344 seeking au-

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[2] The list of abbreviations used throughout this decision may be found in Appendix A.

thority for UP to control WP. The applications were consolidated for hearing. The two proposals are divisible.

[472] By related applications, applicants sought authority under 49 U.S.C. 11301 to issue securities, under 49 U.S.C. 11343 to enter into trackage rights arrangements, under 49 U.S.C. 11342 to pool certain transportation services, and under 49 U.S.C. 11343 and 11344 for UP to acquire control of motor carrier subsidiaries of MPRR and WPRR.

We accepted these applications for filing and published notice of filing in the *Federal Register* on October 15, 1980, 45 Fed. Reg. 68484 (1980).

Many shippers and several States filed comments in support of the proposed consolidations, while a number of railroads, labor organizations, and States are opposed. Numerous conditions, such as trackage rights, labor protection, route, rate and traffic protective, were sought. Twenty-nine responsive applications were filed by rail protestants and accepted February 12, 1981. Several were withdrawn and 25 are now before us for consideration.

Two rail carriers which originally entered the case as protestants withdrew their opposition after agreeing on certain conditions with applicants.

Public hearings on the applications were conducted by Administrative Law Judges Paul S. Cross and Angelo G. Nicchitta from March 3, 1981 to January 6, 1982. The evidentiary record was closed approximately 6 months before the statutory deadline with filing of reply briefs on April 23, 1982.

Nature and Scope of the Primary Applications

As proposed by applicants, a wholly-owned subsidiary of Union Pacific Corporation, UP Subsidiary Corporation, would be merged into Missouri Pacific Corporation.

All issued and outstanding shares of MPC stock would be transferred by UPC to its wholly-owned subsidiary PRSI. UPC would contribute all issued and outstanding shares of UPRR stock to PRSI. UPC through PRSI would indirectly own and control MPC, UPRR, MPRR, and their rail carrier subsidiaries.

Further, UPC and its wholly-owned subsidiaries PRSI, Pacific Subsidiary, Inc. (PACS) and UPRR would control the Western Pacific Railroad Company. PACS and UPRR currently own 87.25 percent of the issued and outstanding shares of WP Class A common stock, which is held by a trustee in an independent voting trust. After Commission and stockholder approval, Union Subsidiary, Inc., a wholly-owned subsidiary of PACS will be merged into WP, and PACS will own all the issued and outstanding shares of WP. PACS will contribute the WP shares to UPRR. Because UPC will contribute all issued and outstanding shares of UPRR stock to PRSI, UPC will indirectly own and control WP through UPRR and PRSI. (The stock transactions are described more fully below in the section of the decision entitled *Terms of Transactions and Securities Issuances.*)

[473] UPC, PRSI and UPRR will also acquire control of Missouri Pacific Truck Lines, Inc., a wholly-owned motor carrier subsidiary of MPRR. UPC, PACS, PRSI and UPRR will acquire control of WPX Freight System, Inc., a wholly-owned motor carrier subsidiary of WPRR.

UPC and its carrier subsidiaries have no officers or directors in common with MPC, WPRR, or their carrier subsidiaries.

UPC is a noncarrier holding company with subsidiaries engaged in railroad operations,[3] real estate and

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[3] Rail carrier subsidiaries of UPC include: UPRR and its subsidiaries Des Chutes Railroad Company, Los Angeles and Salt Lake Railroad Company, Mount Hood Railway Company, Oregon-Washington Railroad and Navigation Company, St. Joseph and

land development, energy and natural resource development.[4] Its gross revenues for 1979 were $4,028,700,000, and net income was $382,500,000.

UPRR operates 9,315 miles of railroad in the following States: Washington, California, Idaho, Montana, Oregon, Nevada, Utah, Wyoming, Colorado, Nebraska, Kansas, Iowa, and Missouri. Its principal lines extend from Seattle, WA, Portland, OR and Los Angeles, CA, through Salt Lake City and Ogden, UT, Cheyenne, WY and Denver, CO, to Omaha, NE-Council Bluffs, IA and Kansas City, MO.

Based on revenues, the principal commodities handled by UPRR in 1979 were farm products, chemicals and allied products, food and kindred products, coal, and lumber and wood products (excluding furniture).

MPC is a non-carrier holding company with subsidiaries engaged in railroad operations,[5] natural gas transmission and exploration, and cement industries.[6] Its gross revenues for 1979 were $1,981,536,000, and net income was $180,157,000.

MPRR operates 11,500 miles of railroad in the following States: Colorado, Texas, Kansas, Nebraska, New Mexico, Oklahoma, Missouri, Illinois, Arkansas, Tennessee, Louisiana and Mississippi. Its principal north-south

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Grand Island Railway Company, Yakima Valley Transportation Company, Oregon Short Line Railroad Company, and Spokane International Railroad Company.

[4] UPC's major non-carrier subsidiaries include Champlin Petroleum Company, Upland Industries Corporation, and Rocky Mountain Energy Company.

[5] Rail carrier subsidiaries of MPC include: MPRR and its subsidiaries Chicago Heights Terminal Transfer Railroad Company; Doniphan, Kensett & Searcy Railway; and the Weatherford Mineral Wells and North Western Railway Company.

[6] MPC's major non-carrier activities are controlled by its subsidiary Mississippi River Transmission Company (MRTC).

line extends from Chicago, IL to the Gulf Coast ports of New Orleans, LA and Galveston, Corpus Christi and Brownsville, TX. Its northern east-west line extends from Chicago, IL through St. Louis, MO, to Kansas City, MO and Omaha, NE, and to Pueblo, CO. Its southern east-west line serves Shreveport, LA, and Dallas/Ft. Worth, Sweetwater, and El Paso, TX.

[474] Based on revenues, the principal commodities handled by MPRR in 1979 were chemicals and allied products, farm products, transportation equipment, food and kindred products, and coal.

WPRR operates 1,482 miles of railroad in California, Nevada and Utah. Its pro forma operating revenues in 1979 were $167,000,000; its net income was $4,700,000. Its principal line extends between Bieber, Stockton, and San Francisco, CA in the west, and Salt Lake City, UT in the east. Rail carrier subsidiaries of WPRR include Sacramento and Northern Railway and Tidewater Southern Railway Company.

Based on revenues, the principal commodities handled by WPRR in 1979 were food or kindred products, pulp, paper or allied products, primary metal products, transportation equipment, and miscellaneous mixed shipments (except forwarder).

The principal points of interchange between UPRR and MPRR are Omaha, NE-Council Bluffs, IA, Topeka, KS, and Kansas City, MO. The principal point of interchange between UPRR and WPRR is Salt Lake City, UT.

The consolidated companies will provide single system rail service connecting the Pacific Northwest, northern and southern California through the central corridor with the Midwest (including all major mid-continent east-west gateways), Mississippi River ports, Gulf Coast ports, and Texas-Mexico border crossing points. Applicants have filed several related applications to allow

operational changes pursuant to their single system plan. These involve trackage rights at Kansas City, St. Joseph, MO, and Omaha-Council Bluffs, and pooling between Omaha-Council Bluffs, Beloit and Salina, KS, and Lincoln, NE and Kansas City. (These applications are described more fully in our discussion of the operating plan.)

POSITIONS OF THE PARTIES

There has been a great deal of participation in this proceeding, by public parties such as the United States Departments of Justice and Transportation, State departments of transportation and other public entities, labor organizations, stock and bond holders, and railroads which believe they and the shippers they serve will be substantially affected by the proposed consolidations. Shippers themselves have also participated, supporting the position of a particular railroad.

Most of the participation was in the form of opposition to the consolidations. Initially 10 Class I railroads actively participated in opposi- [475] tion; 2 later withdrew their opposition after negotiating conditions with applicants.[7]

United States Department of Justice

DOJ actively participated in the proceedings in this case. DOJ argues that the consolidation will result in modest but significant public benefits largely as a result of the unquantified attributes of single system service. DOJ also contends that consolidation will result in a lessening of competition in certain markets in the central corridor, but that the trackage rights sought by DRGW between Pueblo, CO and Kansas City over MP will reasonably address the competitive problem without

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[7] The agreement between Conrail and applicants is set out in Appendix D-1. The agreement between Chicago and North Western Transportation Company and applicants, set out in Appendix C, is discussed more fully in a later section.

impeding the attainment of the anticipated benefits. DOJ does not oppose Commission approval of the consolidation provided that DRGW gains independent access to Kansas City.

United States Department of Transportation

DOT, which actively participated in these proceedings, supports approval of the consolidations because of expected transit time, equipment, service and reliability improvements, and cost reductions. DOT anticipates reductions in competition in certain markets or corridors as a result of consolidation, and recommends conditioning approval on the granting of various trackage rights to avoid these competitive harms.

Office of Special Counsel

OSC, which actively participated in this proceeding, recommends that the Commission deny the proposed consolidations. OSC contends that the consolidations will produce no legitimate public benefits, would result in a net public cost, and would result in major anticompetitive consequences in transcontinental movements through the central corridor, in the north-south Midwest corridor, and in the transportation of coal.

The Atchison, Topeka and Sants (sic) Fe Railway Company

ATSF operates over 12,000 miles of track in the States of Arizona, California, Colorado, Illinois, Iowa, Kansas, Louisiana, Missouri, Nebraska, New Mexico, Oklahoma and Texas. ATSF is a major transcontinental and Gulf carrier with principal lines extending between Chicago on the one hand and Kansas City, Denver, Los Angeles, the California [476] Bay area, Houston and Galveston. In 1979, 39 percent of ATSF's traffic was local and 61 percent was interlined with connecting carriers. Principal interchange points with applicants include Kansas City, Stockton, Sweetwater and Fort Worth. ATSF

estimates that the UP system will divert from its $64.0 million in gross revenues per year. This figure would be in addition to its estimated losses of $28.3 million from the BN-Frisco merger and $82.0 million from SSW's purchase of the Tucumcari line.

ATSF seeks no protective conditions, but states that the proposed consolidations should be denied because (1) they would have serious anticompetitive consequencies, (2) the claimed public benefits could be attained by means short of control, and (3) the affects of the transaction would jeopardize ATSF's ability to provide effective competition.

Burlington Northern Railroad Company

BN operates over 27,000 miles of track in the States of Alabama, Arkansas, California, Colorado, Florida, Idaho, Illinois, Iowa, Kansas, Kentucky, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Washington, Wisconsin and Wyoming. BN is a major transcontinental carrier operating in the northern corridor and a major Gulf carrier operating through the recently acquired St. Louis-San Francisco Railway Company and its Ft. Worth and Denver Railway Company subsidiary. BN is also a major coal carrier, originating 80.2 million tons of coal in 1979, 41 percent of its total tonnage carried. BN estimates that the UP system would divert from it $193.9 million in gross coal revenues per year by 1985, if CNW begins operations serving the Powder River Basin in Wyoming.

BN contends that the proposed consolidation together with the cumulative impact of recent Commission decisions would deny the shipping public competitive rate and service alternatives in the transportation of coal, soda ash, sodium sulfate and other commodities, and may result in unreasonably large market concentrations and in discrimination against connecting carriers. BN does not oppose each aspect of the proposed consolidations,

but seeks certain conditions designed to reduce the anticipated harms while preserving the anticipated benefits.

BN seeks modification of traffic protective conditions previously imposed against it, to enable it to compete effectively with the consolidated system. BN seeks the imposition of rate and service conditions on MP. BN also seeks numerous trackage rights conditions, to enable it to serve directly utilities now served solely by MP, and seeks a condition to require that system equipment be considered a common fleet and deemed home when delivered to any railroad in the system.

[477] *Chicago and North Western Transportation Company*

CNW originally opposed the consolidation due to alleged harm to its ability to improve its service to the public and to provide essential service as a result. CNW is a substantial interchange partner with UP, particularly for transcontinental traffic. In 1979 CNW interchanged over 360,000 carloads with UP at Fremont, Omaha, and Council Bluffs.

CNW sought several trackage rights as conditions to the consolidation, as well as various other protective conditions.

On July 8, 1981, CNW withdrew its opposition and filed notice of a settlement agreement with applicants. CNW and UP agreed to maintain their Fremont/Omaha interchange through a rate provision, and filed an application to permit pooling of transportation services between Omaha/Council Bluffs and Kansas City for certain traffic.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company

The Milwaukee Road, formerly a midwestern and transcontinental carrier operating in the northern cor-

ridor, filed for reorganization on December 19, 1977. The Milwaukee Road operates over a reduced system extending principally from Chicago to Louisville, Kansas City, Milwaukee, Minneapolis, St. Paul and Duluth. Milwaukee estimates it will lose $5.4 million to the new UP system.

Milwaukee opposes the proposed consolidations and seeks a variety of conditions if the applications are approved.

Milwaukee requests that DRGW be granted trackage rights over MP between Pueblo, CO and Kansas City. Milwaukee also seeks to maintain and upgrade its run-through service with applicants in Kansas City, and requests the imposition of certain traffic protective conditions.

Consolidated Rail Corporation

Initially Conrail sought various conditions to remedy what it considered adverse consequences of the consolidation affecting essential services, competition, and efficiency. At an early stage of the proceeding, Conrail withdrew its opposition due to a rate equalization agreement arrived at with applicants.

Denver & Rio Grande Western Railroad Company

DRGW operates over 1,800 miles of track in the States of Colorado and Utah. DRGW is a major transcontinental carrier in the central corridor connecting with SP and WP at its Utah gateway and BN, UP, ATSF [478] and MP at its Colorado gateways. DRGW is also a major originator of coal, originating 16.8 million tons in 1979, nearly half of its total tonnage carried. DRGW estimates the UP system will divert from it $35.3 million in gross revenue per year.

DRGW opposes the proposed consolidations as anti-competitive to shippers for transcontinental rail service through the central corridor. Therefore, it seeks track-

age rights, independent ratemaking authority, and traffic protective conditions to ameliorate the harm foreseen. DRGW also requests that system equipment be considered a common fleet and deemed home when delivered to any of the system railroads.

Illinois Central Gulf Railroad Company

ICG operates over 8,000 miles of track in the States of Alabama, Illinois, Indiana, Iowa, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, South Dakota, Tennessee and Wisconsin. ICG is a major north-south carrier extending from the Great Lakes to the Gulf of Mexico. Principal east-west lines extend from Chicago to St. Louis, Kansas City, Omaha/Council Bluffs, Sioux City and Sioux Falls. In 1979, approximately one-third of ICG's traffic was local with the remaining two-thirds interchanged with connecting carriers. ICG estimates it will lose $11.3 million to the new UP system.

In order to preserve competition and essential services, ICG seeks imposition of a condition requiring maintenance and competitive rates and routes by applicants in connection with ICG. ICG did not file briefs in support of its position.

Kansas City Southern Railway Company

KCS, with its wholly-owned subsidiary Louisiana and Arkansas Railway Company (collectively KCS), operate over 1,600 miles of railroad in Arkansas, Kansas, Louisiana, Missouri, Oklahoma and Texas. KCS is principally a north-south Gulf carrier with major lines extending from Kansas City to Dallas, Port Arthur, Lake Charles and New Orleans. Principal interchange points with applicants include Kansas City with UP and Alexandria, Beaumont, Hope, Jefferson, Kansas City, Shreveport and Texarkana with MP. KCS estimates that the UP system will divert from it $13.6 million in gross revenue per year.

KCS opposes UP's consolidation with MP unless trackage rights are imposed to ameliorate anticompetitive impacts and to enhance competition in markets served by MP which do not have adequately competitive rail service. KCS also expects to suffer as a result of harm to some of its connecting carriers due to the consolidation.

[479] *Missouri-Kansas-Texas Railroad Company*

MKT operates over 2,100 miles of track in the States of Kansas, Missouri, Oklahoma and Texas. MKT is principally a north-south Gulf carrier with major lines extending from St. Louis and Kansas City to San Antonio, Houston and Galveston. In 1979, 15 percent of MKT's traffic was local and 85 percent was interchanged with connecting carriers. MKT interchanges approximately one-fifth of its traffic with UP (at Kansas City) and MP (principally at Dallas-Ft. Worth). MKT estimates that it will lose $23.5 million in gross revenue per year to the new UP system.

The expected loss of revenue, MKT argues, would threaten its ability to provide adequate service, make necessary capital investments, and eliminate deferred maintenance. The revenue loss would thereby threaten the service MKT provides to cities and industries dependent on it for rail service. MKT states that foreclosure of its mortgages and even bankruptcy could be possible consequences of this consolidation.

MKT considers the proposal to be anticompetitive because it would eliminate competition between UP and MP, would increase the number of shippers captive to UP and reduce their service alternatives, would create a huge concentration of economic power in UP, and would give it market power to divert traffic from other carriers to an extent that would impair their ability to provide competitive service. Shippers located on the

lines of non-included carriers would, therefore, be unable to compete with shippers located on the consolidated system's lines. Also, non-included carriers and the communities they serve would be unable to compete for the location of new industries.

MKT requests a number of conditions, if consolidation is approved, including indemnification for financial loss as a result of traffic diversion, and/or trackage rights in six areas. MKT also requests that system equipment be considered a common fleet and deemed home when delivered to any of the system railroads.

Southern Pacific Transportation Company

and

St. Louis Southwestern Railway Company

SPT and SSW (collectively SP) operate over 12,000 miles of track in Arizona, Arkansas, California, Illinois, Kansas, Louisiana, Missouri, Nevada, New Mexico, Oklahoma, Oregon, Tennessee, Texas, and Utah. SP principally serves the Pacific Coast region, transcontinental markets, and Texas/Gulf markets. Major freight lines extend from Portland, OR to Los Angeles, from the San Francisco Bay area to Ogden, UT, from Los Angeles to St. Louis via Tucumcari and via Corsicana, and from Los Angeles to New Orleans. SP has not yet upgraded the Kansas City-St. Louis portion of its recently purchased Tucumcari line to operating condition. [480] In 1979, 32 percent of SPT's and only 4 percent of SSW's traffic was local; the remainder was interchanged with connecting carriers. Among SPT's principal connecting carriers is UP which interchanged 230,655 carloads with SP at Ogden, 44,756 carloads at Portland/E. Portland and 30,556 carloads at Los Angeles. SSW's principal connection is SPT. SP estimates it will lose to the new UP system $105.2 million per year.

SP opposes the consolidation as anticompetitive and harmful to essential services. SP argues that UP is a dominant force in western rail markets and that consolidation, especially considering the newly available ratemaking freedom of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (Staggers Act), would enable UP to eliminate competition and control prices in the central corridor and on north-south traffic.

SP argues that there are significant parallel aspects of the consolidation which would reduce shipper alternatives in several markets, that competition between Pacific Coast and Gulf Coast ports will be diminished, and that essential services provided by SP will be reduced. It argues that it will lose its long-haul UP connection between California points to and from Ogden if UP controls WP, and be relegated to a short California junction haul or a switch. Further, it fears that if the traffic is converted to TOFC (Trailer on Flat Car) it may lose all its revenue from traffic interlined with UP at the Utah gateways. The necessary reduction in capital expenditures as the result of loss of its long haul will have a substantial detrimental effect on its ability to originate and terminate traffic in its exclusively served California and Oregon territory. SP also contends that the UP-WP consolidation violates the Pacific Railroad Acts.[8]

SP seeks several trackage rights as conditions if consolidation is approved, as well as several traffic protection conditions.

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[8] SP has made allegations that UP is already exercising unauthorized control of WP and has submitted some evidence purported to support these allegations. This evidence shows that UP has leased some equipment to WP at below market rates and is working cooperatively with WP. This evidence does not in any way show UP to be exercising control over WP and SP has not renewed these allegations on brief. The allegations and evidence do not raise a colorable issue of unlawful control and will not be considered further.

Other Railroads

The Soo Line Railroad Company requested the imposition of routing and gateway protective conditions, but did not otherwise participate in the proceeding. Soo Line presented no evidence warranting imposition of these conditions. We will give no further consideration to the position of Soo Line.

The City of Prineville Railway operates 29 miles of railroad between Prineville and Redmond, OR. Owned and operated by the City of Prineville, the railroad connects with UP and BN at Redmond. Both the city [481] and the railroad depend upon the lumber industry for their survival. Recently, the railroad sought reorganization as an employee owned railroad. It opposes the consolidation but seeks inclusion in the UP system if approved because of the threat it sees to its existence as a result of the dominance in rates, equipment and transit times by large rail systems such as UP and BN.

State Governments

A number of States [9] participated in this proceeding. Some filed comments when the applications were filed, some participated actively in the hearing process, and some submitted verified statements whose sponsors were subject to cross-examination. The positions of several States submitting verified statements are set out here.

The people of the State of California, the State Department of Transportation and the Public Utilities Commission support the UP-MP-WP consolidations because of a resulting strengthened and more competitive

[9] The following states filed comments in support of the consolidations: Iowa, Nebraska, Wyoming, Arkansas, Idaho, Missouri, Kansas, Indiana, Utah and Washington. New Mexico filed comments in opposition to the consolidations. The following states filed comments in support of one or more protestant railroad's proposed conditions: Oklahoma, Oregon, California, Arizona, Colorado, Texas, Wisconsin, and Kansas.

WP and the benefits of single system service for certain California shippers. California supports conditions which will improve the effectiveness of the DRGW as a transcontinental carrier and provide alternatives for shippers of traffic between California and southeastern points. California supports DRGW's proposed trackage rights between Pueblo and Kansas City, and SP's proposed trackage rights between Kansas City and St. Louis, as inducements to competition.

The Public Utility Commission of Oregon supports the UP-MP consolidation because of the anticipated benefits of single system service to shippers, and the enhanced financial health of the merged system. Oregon opposes the UP-WP consolidation, but in the alternative supports the proposed trackage rights of SP between Kansas City and St. Louis, and DRGW between Pueblo, CO and Kansas City. This is because of its concern that competition over the central corridor be maintained, and that SP continue to serve captive Oregon shippers.

The Washington Utilities and Transportation Commission supports the UP-MP-WP consolidations because a stronger UP will benefit Washington shippers. WUTC requests the imposition of conditions to protect the financial viability of BN and the WP's Bieber route which connects Stockton and Bieber, CA, as a necessary competitive link for the movement of traffic between the Pacific Northwest and points in the Southwest.

Kansas City Board of Trade

[482] The Board opposes consolidation unless standard DTI condition No. 1 is imposed. (*Detroit, T. & I.R. Co., Control*, 275 I.C.C. 455, 492 (1950)). This condition requires the maintenance of existing routes, gateways and channels of trade.

The Board argues that without this condition competition will be eliminated, because UP and MP would maintain their present joint service on grain from most UP

origins in Kansas and Nebraska to Galveston and Houston but would change tariffs to eliminate the other four presently available routes in which it participates.

Sierra Curtis Neighborhood Association

SCNA, formed by a group of residents in the Sacramento neighborhood which is bordered by the South Sacramento Western Pacific railroad yard, is concerned about the environmental impact of present WP operations on the neighborhood, as well as the impact of future UP-WP operations.

Labor

Various labor organizations [10] filed comments in opposition to the proposed consolidations; they argue that the transactions will be harmful to the interests of railway employees. They advocate the imposition of conditions more protective than those previously imposed (*New York Dock Ry.-Control-Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), affirmed, *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979)). They seek protection for employees of non-applicant railroads who may be affected by the consolidations.

Water Transport Association

The WTA opposes the proposed consolidations unless its requested conditions to enhance rail-water competition and coordination are imposed.

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[10] Brotherhood of Maintenance of Way Employees, Brotherhood of Railroad Signalmen, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, International Association of Machinists and Aerospace Workers, United Transportation Union, Brotherhood Railway Carmen of the United States and Canada, International Brotherhood of Electrical Workers, International Brotherhood of Firemen and Oilers, and Sheet Metal Workers' International Association.

Stockholders

Several stock and bond holders object to the consolidation as it may affect their interests. The issues are specifically discussed in the section entitled *Terms of Transactions and Securities Issuances.*

[483] DISCUSSION AND CONCLUSIONS

Statutory Criterion: The Public Interest

Our review of the proposed consolidation of UPC, MPC and WP is governed by the basic standard of 49 U.S.C. 11344; we are required to approve the transaction if we find it to be "consistent with the public interest." *See Missouri-Kansas-Texas R.R. Co.* v. *United States*, 632 F.2d 392, 395 (5th Cir. 1980), *cert. denied* 447 U.S. 9793 (1981) (*Missouri-Kansas-Texas*). Several sources help define this broad standard.

Section 11344(b) Factors:[11] Congress has directed us to consider the following factors in determining whether to approve a proposed consolidation as consistent with the public interest:

> (1) the effect of the proposed transaction on the adequacy of transportation to the public;
>
> (2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction;

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[11] Section 228(e) of the Staggers Act specifies that the Act shall not apply to applications filed under 49 U.S.C. 11344 which were pending before this Commission on October 1, 1980. *See Chicago & N.W. Transp. Co.-Construction*, 363 I.C.C. 906 (1981) (*Connector Line*) *aff'd sub nom. Mobil Oil Corporation* v. *Interstate Commerce Commission*, No. 81-2037 (D.C. Cir. July 22, 1982). Therefore, in evaluating the primary applications in this proceeding we have applied section 11344 as it existed prior to amendment by the Staggers Act.

(3) the total fixed charges that result from the proposed transaction; and

(4) the interest of carrier employees affected by the proposed transaction.

49 U.S.C. 11344(b)(1979).

A fifth factor dealing with competitive affects of the proposed transaction [12] was added by section 228(a) of the Staggers Act. The addition of this factor was not meant to change prior law, but rather represented a codification of our traditional approach to the evaluation of rail consolidations. *See Norfolk Southern Corp.-Control-Norfolk & W. Ry. Co.*, 366 I.C.C. 171, 190 (1982) (*Norfolk Southern*). While the Staggers Act itself is not applicable to this proceeding, the policies set forth in 49 U.S.C. 11344(b)(5) (1980) as a codification of prior law will be followed.

Statutory Policies: We also are guided in our consideration of this rail consolidation by the national transportation policy of 49 U.S.C. 10101 [13] [484] and the

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[12] (5) whether the proposed transaction would have an adverse affect on competition among rail carriers in the affected region.

[13] It is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes-

(1) to recognize and preserve the inherent advantage of each mode of transportation;

(2) to promote safe, adequate, economical, and efficient transportation;

(3) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;

(5) to cooperate with each State and the officials of each State on transportation matters; and

(6) to encourage fair wages and working conditions in the transportation industry.

stated policies of recent rail reform legislation such as the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210 (4R Act). In the 4R Act, Congress provided a policy guideline by declaring its purpose to encourage "efforts to restructure the [railway system of the United States] on a more economically justified basis . . ." 45 U.S.C. 801. The legislative history of the 4R Act specifically states that it is "intended to encourage mergers, consolidations, and joint use of facilities that tend to rationalize and improve the Nation's rail system." S. Rep. No. 94-499, 94th Cong., 1st Sess. 20 (1975). *See also Missouri-Kansas-Texas*, 632 F.2d at 396.

The most recent expression of Congressional policy in the area of rail consolidations, the rail transportation policy of section 101a of the Staggers Act, 49 U.S.C. 10101a is not specifically applicable in this proceeding. Nonetheless, we examine "the full implications of each proposal to determine the potential short-term and long-term effects," *CSX Corp.-Control-Chessie and S.C.L.*, 363 I.C.C. 518, 549 (1980) (*CSX*). In examining future effects of the proposed transactions we must be cognizant of the Congressionally-mandated policies that will then be applicable. *Connector Line*, 363 I.C.C. at 916 n.7, 927. *See also Ziffrin, Inc.* v. *United States*, 318 U.S. 73, 78 *reh. den.*, 318 U.S. 800 (1943); *Potomac Electric Power Co.* v. *United States*, 584 F.2d 1058, 1066-67 (D.C. Cir. 1978).

The primary theme of the 15 elements of the rail transportation policy is that we "ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes," 49 U.S.C. 10101a(4). Indeed, the rail transportation policy emphasizes the importance of the relationship between ensuring adequacy of transportation and retention of competition. We are "to allow . . .

competition and the demand for services to establish reasonable [rail] rates," § 10101a(1); "to foster sound economic conditions . . . and to ensure effective competition and coordination between rail carriers and other modes," § 10101a(5); "to minimize the need for Federal regulatory control over the rail transportation system" while maintaining "reasonable rates where there is an absence of effective competition," § 10101a(2), (6); and "to avoid undue concentrations of market power," § 10101 a(13). We must also "encourage fair wages and suitable working conditions in the railroad industry." 49 U.S.C. 10101a(12).

[485] The rail transportation policy provides a gloss on our application of prior law in the consideration of future effects.

Antitrust Considerations: We are required by a long line of cases to consider the policies embodied in the antitrust laws in our analysis of the public interest.[14] As the Supreme Court has observed, the antitrust laws give "understandable content to the broad statutory concept of the public interest." *FMC* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 244 (1968).

In *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87 (1944) (*McLean*), the Supreme Court noted the proper weight to be accorded to antitrust policy in carrier consolidation proceedings:

> In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc.,

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[14] Our antitrust analysis is particularly important because 49 U.S.C. 11341(a) of the Act exempts transactions approved by the Commission from the antitrust laws. *United States* v. *I.C.C.*, 396 U.S. 491, 504 (1970).

> to determine whether the consolidation will assist in effectuating the overall transportation policy * * *. "The wisdom and experience of that Commission," not of the courts, must determine whether the proposed consolidation is "consistent with the public interest."

Accord, Bowman Transportation v. *Arkansas-Best Freight*, 419 U.S. 281, 298 (1975); *Port of Portland* v. *United States*, 408 U.S. 811, 841 (1972); *Northern Lines Merger Case*, 396 U.S. 509, 514 (1970); and *Denver & R.G.W.R. Co.* v. *United States*, 387 U.S. 485 (1967) (Denver & R.G.W.R.).

Notwithstanding our consideration of competition in analyzing a proposed consolidation, we do not sit as an antitrust court in determining compliance with the Clayton, Sherman or related antitrust acts. Northern Lines Merger Case, supra, at 514. As the Supreme Court noted in McLean, our statutory obligation under the public interest standard is broader. We must balance any anticompetitive effects of a consolidation against its anticipated transportation benefits. We are empowered to disapprove consolidations which would not violate the antitrust laws and to approve consolidations even if they otherwise would violate the antitrust laws. *United States* v. *I.C.C.*, 396 U.S. 491 (1970).

Special Findings: We are required by 49 U.S.C. 11344 (c) to make special, narrowly focused public interest findings (where applicable) on the following aspects of any major rail consolidation: (1) a guaranty or assumption of the payment of dividends or of fixed charges, or an increase of total fixed charges; (2) joint rail-motor operations; or (3) inclusion of rail carriers located in the area, 49 U.S.C. 11344(c).

Environment and Energy Factors: Environmental and energy factors also have a bearing on the public interest. The National Environmental Policy [486] Act of 1969

(NEPA),[15] requires us to consider the effects of the transaction on the environment; we must consider the transaction's effect on the conservation of energy resources, under the Energy Policy and Conservation Act (EPACA).[16]

Policy Statement. On February 2, 1981, we issued a policy statement on rail consolidations to clarify how we incorporate the numerous elements of the public interest in evaluating specific consolidation proposals. *Railroad Consolidation Procedures*, 363 I.C.C. 784 (1981). We announced that we perform a balancing test weighing "the potential benefits to applicants and the public against the potential harm to the public." 49 CFR 1111.10(c) (1981), now codified at 49 CFR 1111.1(c), *Railroad Consolidation Procedures*, 366 I.C.C. 75 (1982).

Benefits from a proposed consolidation arise from operating efficiencies and marketing opportunities which can make the consolidated carrier a financially stronger competitor, and better able to provide adequate service on demand. 49 CFR 1111.10(c)(1) (1981) (now codified at 49 CFR 1111.1(c)(1)). Operating efficiencies often arise from elimination of duplicative facilities and utilization of more direct routings. Additionally, we have recognized that in some instances, consolidations may be the only feasible way for rail carriers to enter new markets. Our analysis of the potential harm from a proposed consolidation focuses on two impacts highlighted by the statutes and policies discussed above: any reduction in either intra- or intermodal competition which would likely result from the consolidation; and any harm to essential services provided by competing carriers occurring, for example, when traffic shifts expected from the consolidation are so substantial that essential service over a com-

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[15] 42 U.S.C. 4321 et seq., *See* 49 CFR 1108 (1980).

[16] 42 U.S.C. 6201 et seq., *See* 49 CFR 1106 (1980). Energy conservation is also a matter for our consideration under the rail transportation policy, 49 U.S.C. 10101a(15).

peting carrier's line would no longer be economically viable. 49 CFR 1111.10(c)(2) (1981) (now codified at 49 CFR 1111.1(c)(2)).

Standards Applicable to Responsive Applications: Section 228(e) of the Staggers Act specifies that any "application filed or pending on the effective date" of the Act shall be adjudicated as if the Act had not been enacted. While the primary applications were filed prior to the effective date of the Staggers Act, it has been argued that the responsive applications were filed after the effective date of the Act and are independently subject to its terms.

We disagree. The responsive applications are not independent applications. Each requires the exercise of our conditioning power under 49 U.S.C. 11344(c) as a part of any approval of the primary transaction. Therefore, a necessary element of each of the responsive applications, [487] i.e. the primary applications, was "pending on the effective date" of the Staggers Act within the meaning of section 228(e).

If the responsive applications were to be treated otherwise and considered to be independent applications, then we would have to dismiss those applications as being incomplete because they lack the essential element of an agreement between the parties. In a consolidation proceeding, however, we consider whether applicants should be required to enter into agreements, as sought in responsive applications, as a condition to consummating the primary transaction.

Evaluation of the Record: The record in this proceeding includes the primary application, numerous responsive applications, opposition statements and traffic studies, and the transcript of oral hearings conducted over the course of several months. In reaching our decision in this proceeding, we are required to look beyond the separate concerns of the parties and independently deter-

mine whether the proposed consolidation is "consistent with the public interest" as defined above. In doing so, we have examined the entire record. We have weighed elements of the public interest and evaluated both the potential short- and long-term impacts of the consolidation. In particular, in evaluating the potential harm arising from the consolidation we have considered, *inter alia*, the possible foreclosure of competition, possible effects on essential services, and the potential impact on the interst [sic] or employees.

We conclude that the consolidation applications in Finance Docket 30,000 *et al.*, and each of the directly related applications, as conditioned, are consistent with the public interest and should be approved.

Adequacy of Transportation

Public Benefits

In seeking to determine whether a consolidation is consistent with the public interest, we must first determine its effect on adequacy of transportation to the public. In so doing we examine the benefits to the public which will result from the consolidation.

Of course, proposed consolidations are likely to result in benefits to the corporate entities seeking our approval. However, these private benefits, in the form of increased revenues, do not necessarily reflect public benefits, so we must distinguish purely private benefits from those which will also inure to the benefit of the public.

Private benefits which do not also reflect benefits to the public may include transfers of revenues from one carrier to another. If these transfers do not at the same time affect transportation efficiency or the ability of any carrier to provide essential services, we consider these benefits to be neutral. Revenue transfers which result in reduced com- [488] petition, the ability of a carrier to exact

monopoly profits, and ultimately the reduction of efficient transportation services reflect private benefits which result in harm to the public.

The major cause of revenue transfers as a result of rail consolidations is traffic diversion. Intramodal diversion in itself is neither a public benefit nor a harm. It may reflect or measure the public benefit of improved service, or it may result in harm to the public if it results from the exercise of market power. This may result in inefficiency, the ability to achieve monopoly profits, reduced competition and harm to essential services.

Intermodal diversion may more clearly reflect a public benefit than intramodal diversion. New rail service which can attract traffic carried by motor carriers is itself a benefit because it provides a competitive and fuel-efficient alternative to shippers who formerly relied only on one mode.

Private benefits which are also public benefits include cost reductions and service improvements resulting from operating efficiencies. With improved service, resources are used more efficiently and energy, labor and inventory costs decline throughout the railroad industry as well as the economy as a whole. Cost reductions resulting from more efficient operations benefit the public directly to the extent they are passed on to shippers through reduced rates and deferred rate increases. Savings generated by cost reductions reflect the amount of resources freed for other productive uses. *CSX*, 363 I.C.C. at 556.

Efficiency-related cost reductions also benefit the public by creating a stronger, more financially viable, responsive and competitive railroad industry, enhancing its capital base by ensuring that resources are available for the maintenance of transportation equipment and facilities. Activities which enhance competition are in the public interest because the public ultimately benefits by the efficient use of resources which competition provides.

Because competition itself benefits the public, the anticipated competitive responses of other carriers to a consolidation are public benefits. The public can only benefit when carriers are forced to examine their operations and take actions to improve service in response to a new competitor on the scene. *Burlington Northern, Inc.-Control & Merger-St. L.*, 360 I.C.C. 788, 939 (1980) (BN-Frisco).

In this proceeding, applicants estimate that the UP-MP-WP consolidation will produce $64 million in quantifiable annual net benefits derived from operating and administrative efficiencies in a normal year after giving effect to all changes resulting from the consolidations. Applicants estimate annual net revenues as a result of intramodal diversions to be [489] $32.5 million, and further estimate annual net revenues as a result of intermodal diversions to be $7.9 million. This results in a total of $106.4 million in annual net revenues to the combined system. Our analysis of applicants' traffic diversion and cost studies appear in Appendices F-I, H, and I, along with our restatements.

Applicants' figures reflect their estimate of the total private benefits derived from consolidation. Because we do not believe that all of the private benefits are necessarily public benefits also, we have examined the benefits anticipated by applicants and conclude that the public will derive benefits amounting to $47 million annually as a result of consolidation. Applicants will realize benefits of approximately $85 million annually as a result of consolidation. Our analyses appear in Appendices H and I.

The public benefits of this consolidation are attributable to service improvements, cost reductions resulting from operating efficiencies, enhanced competition, and a stronger financial position for the consolidated system.

Service Improvements

The significant service improvements resulting from the proposed consolidations are derived from the ability to provide efficient single system rail service between regions and markets which either have no such service at present or which have no competitive alternatives to the service that already exists. The consolidated system will provide new single system service between the Pacific Northwest and the Gulf, in direct competition with BN; between northern California, the Midwest and Gulf, between southern California and the Midwest and the Gulf and between the Rockies and Plains and the Midwest and the Gulf. Interlining will be reduced in the transcontinental markets, which the consolidated system will reach via the St. Louis, Memphis and New Orleans gateways.

Shippers prefer single line or single system service because it improves reliability and transit times, and equipment availability. *Norfolk Southern.* Shippers can more efficiently use their resources by dealing with and relying on one carrier instead of several on questions of schedules, special service requirements, car tracing, and loss and damage claims. Shippers benefit from improved equipment availability which results when unified rail management implements a plan for the efficient use of its equipment, resulting in more reliable service. Shippers also benefit from improved transit times and resultant reduced equipment costs made possible when single rail systems are able to minimize interchange delays by increasing the use of preblocking and run-through trains. [490] The proposed operating changes implementing single system service are discussed in the following section. As an example of the benefits expected due to the new service, applicants propose to save a day or more in transit time between Omaha/Council Bluffs and the South Central States by avoiding reclassification in Kansas City.

The proposed consolidation will open new markets to shippers located on one of the applicants' lines by providing efficient single system access to the Pacific Northwest, northern and southern California, the Rockies and Plains States, the Midwest, South and the Gulf Ports, Mexican border crossing points, and the St. Louis and Memphis gateways to the east. In 1979, over 70 percent of both UP and MP's traffic was interlined, and those shippers after consolidation will be positioned to take advantage of efficient single system service to many new markets.

Export grain shippers located on one of the system's lines will have the flexibility to choose between single system rail service to West Coast and Gulf Coast ports and thus avoid embargoes and port congestion. The new service will also enable grain shippers to take advantage of grain price differentials in alternative markets. Grain shippers located on the UP will have new single system service to Mexican border crossing points served by MP, and will be able to take advantage of that growing market. Grain producers on the UP will have incentives to develop new production areas for consumption in markets served by MP, due to the advantages of single system service.

Because MP's routes between northern Kansas grain origins and central Kansas grain terminals are circuitous, much of that traffic is presently served by motor carrier. UP does not participate in the traffic because it would gain only a short haul. This is analogous to the gateway watershed problem discussed in our *Norfolk Southern* decision as it related to coal, another bulk commodity. After consolidation UP has an incentive to participate in traffic which previously could provide it only a short haul to an interchange point. After implementation of the proposed pooling arrangements between Beloit and Salina, KS, the system will operate a route which will be substantially shorter than the present MP route which is not competitive with motor carrier service,

and will provide an alternative to the motor-rail movement used today. Shippers will have the alternatives of moving their grain via a single system to terminals at Salina, on to Wichita, or in unit trains to the Gulf.

Coal users and producers can take advantage of the expanded market access both for export and domestic markets. With efficient single system service from coal producing areas in Utah, Colorado, and Wyoming, California ports will be encouraged to develop coal exporting facilities. The resulting development of international markets for coal will aid the [491] U.S. economy as well as the world's need for alternative energy sources. The consolidation will also enhance shipper access to domestic markets for manufactured goods, coal, feed grains, TOFC shipments, and perishables.

The new single system service will be competitive for traffic moving by motor carrier today, and the existence of a rail alternative providing shippers with competitive rate and service options is a public benefit. Applicants estimate annual gross revenue diversions from motor carriers at $32.5 million, resulting in net revenue gains of $7.9 million. Applicants' estimate may be understated. Applicants' non-rail traffic diversion study is discussed in Appendix F-1.

Applicants propose the development of an alternative route for run-through service in the Kansas City terminal area that is designed to reduce congestion over the sole main line route through Kansas City, and to expedite the new run-through service proposed by applicants. It will also provide an alternative route for all carriers through Kansas City. Because that is an area of high traffic density, such an upgrading can only benefit operations through Kansas City in the future.

Applicants propose a $90 million upgrading of WP's main, secondary, and subsidiary lines, which will take place over a 5 year period. WP is a small interline car-

rier competing with large rail systems for a portion of the traffic originating or terminating in northern California. Over 90 percent of its traffic is interlined. WP's expenditures on its physical plant, while adequate for the traffic handled today, are not likely to be adequate to handle additional traffic at the level of service projected by applicants. Further, although WP has been financially unable to afford some needed repairs, its access to the consolidated system's financial strength will eliminate all WP deferred maintenance and strengthen the UP system as a competitive alternative to the rail systems and motor carriers with whom WP competes.

The proposed upgrading of the WP will make it a stronger link in the consolidated system than it would otherwise be, enhancing the ability of the system to provide competitive single system service in the markets which it will serve. In particular the Ports of Oakland, Sacramento and Stockton which are served by WP have stressed the importance of single system rail service for their own ability to provide competitive service.

California supports the consolidation because it will strengthen WP as a competitor to SP and ATSF in northern California by improving WP's financial resources and expanding its traffic base. Further, California noted that the anticipated improved freight car supply is a substantial benefit to shippers.

[492] Without this upgrading, one link in the chain which would make the consolidated system a strong competitor for transcontinental traffic, and traffic from northern California to the Midwest and Gulf would be weakened, and the primary public benefit of the proposal—the creation of a new, strong, competitive single rail system—would be undermined. Access to and from northern California markets would be hampered if the system were to depend on either a joint-line relationship with WP or control of a WP which is physically in-

capable of providing the level of service planned by applicants and sought by shippers.

Although the benefits of single system service are not as great as those achievable with single line service, the advantages over joint-line operations are substantial. Some costs of interlining are retained with single system service, but it is the establishment of corporate priorities for the entire system, rather than by each railroad individually, which results in the benefits of both single line and single system service. *CSX*, 363 I.C.C. at 553.

Applicants propose to establish one system-wide traffic department under PRSI to implement marketing, service and pricing activities for the entire system. This will facilitate the system's response to changing needs of shippers and the actions of other single system carriers, and will eliminate the necessity for negotiations among carriers with differing economic and operational priorities. For example, each railroad is inclined to seek its longhaul, which can result in time-consuming negotiations when a 2- or 3-line haul is required for a movement. Such negotiations will be avoided under applicants' proposal. Railroads differ in their response to shippers' equipment requests, for reasons both of availability and policy. Some of the problems arising out of these differences will be resolved by a unified management approach.

Protestants argue that we may not consider coordinations which are available without system consolidation to be public benefits arising from consolidation. It is true that trackage rights, pooling, run-through and some joint facility arrangements are available without consolidation, and we encourage carriers to enter into these arrangements. Such coordinations, however, require negotiations not only before they are implemented; they require continuing cooperation while they exist. There is substantial evidence that because management priorities

change, many coordinations do not endure and may not operate at maximum efficiency.

It is not reasonable to expect that independent management of the three applicant carriers would agree on the numerous coordinations necessary to implement the operating plan proposed here. The essential element which will allow for all the proposed service benefits and operating savings is unified management.

[493] The ability of an integrated management to set the priorities for the component carriers provides the internal flexibility necessary to rearrange the various operating agreements which constitute single system service and maximize its benefits, as time and circumstances change. It is for this reason that most of the benefits of the proposed consolidations are not at all likely to be achieved without consolidation, even though some of the elements of the operating plan are available without consolidation.

Operating Changes [17]

The applicants have submitted detailed operating plans for their proposed transactions, projecting various operating changes over a five-year period. Applicants seek to take advantage of opportunities to operate more efficiently, to provide improved service, and to ensure that service to shippers is better than that presently provided. The proposed consolidation provides single system service on complementary east-west and north-south routes, and applicants propose no changes in these principal routes.[18]

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[17] Savings and costs attributable to each aspect of the operating plan are set out in Appendix H.

[18] In the Sub-No. 5 proceeding, UP seeks bridge trackage rights over tracks of MP between milepost 278.0 in Kansas City, MO to milepost 284.7, in Kansas City, KS, a distance of approximately 7 miles. UP also seeks bridge rights over certain tracks in Neff Yard

Train Service

Applicants propose to add new trains and to increase the numbers of classification blocks made at major terminals throughout the system. Based on the results of their traffic studies and internal reroutings, the applicants propose to institute 24 new trains, including improved run- [494] through service at St. Louis with Conrail and L&N; two new manifest and two TOFC through trains between Oakland/Stockton and North Platte; modify 25 existing schedules; and discontinue 12 schedules including two MP trains between El Paso and Ft. Worth, two MP trains between Pueblo and Kansas City, and two WP trains to/from the Rio Grande at Salt Lake City. Specifically, between North Platte and St. Louis 17 new run-through trains will be implemented

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of the MP, plus bridge rights over certain sidings and auxiliary tracks.

In the Sub-No. 6 proceeding, UP seeks bridge trackage rights over tracks of MP at St. Joseph, MO, including bridge rights overyard trackage for a total distance of 1.7 miles.

In the Sub-No. 7 proceeding, MP seeks to extend its existing bridge trackage rights over tracks of UP between milepost 6.52 in Omaha, NE and milepost 0.00 in Council Bluffs, IA, including certain yard tracks, passing sidings and auxiliary tracks.

These transactions will facilitate consolidated operations, increase the carriers' operating flexibility, and improve service.

In the Sub-No. 8 proceeding, the applicants seek to transport certain UP traffic in MP trains, over MP tracks between Omaha/Council Bluffs and Kansas City.

In the Sub-No. 9 proceeding the applicants seek to transport certain MP traffic in UP trains, between Beloit and Salina, KS.

In the Sub-No. 10 proceeding the applicants seek to transport certain MP traffic in UP trains, between Lincoln, NE and Kansas City, MO.

The purpose of these pooling agreements is to enable the applicants to coordinate operations and to provide efficient and responsive transportation service through operational flexibility. The proposed pooling arrangements will provide a means for the applicants to better utilize train capacity and effect economies of operation by eliminating circuitous routes.

with improved connections with Conrail by blocks for Columbus, OH and Enola, PA which will combine at St. Louis with trains from the Southwest and North Platte. New run-through service with the L&N at St. Louis, prompted by traffic diversions, includes new classification blocks for Atlanta and Evansville, IN.[19]

New through train service from Council Bluffs/ Omaha to the South Central States is proposed. This service will save a day or more in transit time by avoiding reclassification at MP's Neff yard in Kansas City. Similar transit time savings will be achieved by new run-through service between Little Rock and North Platte via Kansas City, and from Texas points to North Platte. This will avoid further switching at Little Rock and Kansas City. The operation of a new manifest train in each direction between North Platte and northern California locations via the WP is included in the applicant's operating plan.

Blocking

The applicants plan to make 65 new classification blocks throughout the consolidated system, while discontinuing 13 blocks. Particular attention has been given to using these blocks in the building of trains to achieve a maximum distance before setting out traffic for further distribution. For example, traffic originating at MP locations for the Pacific northwest will be moved in a single "North Platte or beyond" block for run-through operation at the Kansas City terminal area. Likewise,

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[19] UP's Bailey Yard, located at North Platte, NE, is and will remain a principal classification yard after the consolidation. The operating plan provides that six new trains will originate and seven new trains will terminate at this facility. Ten new blocks will be made at Bailey Yard. An additional 203 cars will move though this terminal daily, including TOFC-COFC cars. This increased volume can be absorbed in the current terminal operation by utilizing recent capacity expansion.

forming two St. Louis blocks at UP's Fairfax yard in Kansas City will eliminate interchange movement and switching delays in the Kansas City terminal area.

Common Point Consolidations

To maximize operating savings and service efficiencies, applicants propose numerous coordinations and consolidations of facilities. At Omaha/ [495] Council Bluffs, the applicants propose that UP will operate the terminal under a joint facility agreement with MP. All MP road train operations will be conducted out of the UP's Council Bluffs Yard. Switching of industries presently served by MP will be assigned to Eighth Street Yard, and MP will acquire trackage rights over UP between Omaha and Council Bluffs. These changes will result in reducing interchange delays and will improve car utilization by eliminating duplicate handling of cars. The MP's Nicholas and Grace Street Yards will be utilized as storage facilities for UP's Omaha shops, thus separating shop support operations from industrial support and train operations.

At Kansas City, the applicants state that a joint facility agreement will be implemented to consolidate UP and MP terminal operations under the supervision of a General Terminal Superintendent and staff. A combined Customer Service Center and Operations Control Center will be established at MP's Neff Yard. The Customer Service Center will provide a single contact point for all customers within the joint facility. Computer-to-computer connections will be made between UP and MP data systems to facilitate train, interchange, and industry reportings.

Other yard activities in Kansas City will generally be maintained as they now exist. However, all current MP Fairfax industrial switching will be transferred to

switch engines assigned to the present UP Quindaro Yard. Yardmaster duties are to be consolidated in the Armstrong-Kaw Bridge area. This will result in coordinated switching of the industries in Fairfax and will permit pre-blocking of outbound loads. These blocks can be added in correct order to through trains at Cypress Yard, eliminating further switching, intra-terminal movements, and interchange delays. In addition, six switch engine shifts per week will be saved.

At St. Joseph, MO, MP will perform all UP switching and mechanical work, except at Elwood, which will continue to be handled by the St. Joseph Terminal Railroad Company. MP will perform all St. Joseph station and agency work at Atchison, KS. UP will operate into and out of MP's yards via a new connection from the UP Missouri River Bridge to MP tracks. This direct UP operation into MP's yard will save 12 hours in the delivery of traffic to MP industries. Cars interchanged to other carriers will neither lose nor gain any appreciable time.

At Salt Lake City, DRGW provides WP with terminal services for all traffic not moving in UP-WP run-through trains. Following consummation, applicants propose consolidating UP and WP terminal operations and shifting most of WP's terminal work to UP's North Yard. WP's freight, yard, and accounting functions can be consolidated with UP's existing operation. This coordination will permit UP to perform WP locomotive servicing and repair as well as freight car repairs. UP can also [496] handle WP's TOFC traffic through UP's Becks Ramp facility. Interchange to and from other connecting lines will continue as currently performed by UP. Movement of WP operations from DRGW's Roper Yard to UP's North yard will cause a shift of 100 cars per day.

Similar consolidations are planned at the remaining common points of Topeka, Hiawatha, Salina, McPherson,

Beloit and Kanopolis, KS, and Hastings and Lincoln-Weeping Water, NE. Generally these consolidations will provide for joint agency operations, combination of clerical positions, and retirement of station facilities.

The cost savings resulting from the above consolidations of facilities are due to reduced equipment needs, lower car hire and car maintenance expenses, reduced labor force, and lower terminal company charges, and amount to almost $5 million annually.

Kansas City Terminal Operations

The applicants' operating plan provides for a net increase of 11 through trains per day through the Kansas City terminal area and two trains daily between North Platte and Neff Yard. A total of 315 additional cars will be entirely new to the Kansas City terminal area. A significant portion of these new cars will be on run-through trains. As a result of new classifications, blocking procedures, run-through trains and coordination of facilities, an average of 26 fewer cars per day will be classified by the applicants in the Kansas City terminal area. It will not be necessary to handle this additional traffic between the two carriers over the Kansas City Terminal's four-track main line. Because of existing and potential train densities on this track segment, another main track route has been selected for development as the primary route for UP-MP traffic, increasing operating flexibility in the terminal.

The new route will enable eastbound run-through trains to be routed via UP-MP trackage through the Santa Fe Street-Broadway Tower area to the Troost Avenue area, where they will use either of the two alternate connections to tracks 80 and 81 of the Kansas City Terminal Railway Company (KCT). KCT trackage will be used between Troost Avenue and either Rock Creek

Junction or Big Blue Interlocker. Westbound trains will be able to use the reverse route. A connection will be constructed between KCT and MP trackage near Big Blue Interlocker to allow MP trains to and from Osawatomie to use this route.

Upgrading of KCT tracks 80 and 81 is proposed by the applicants. This upgrading extends between Troost Avenue and Rock Creek Junction, a distance of approximately five miles. The upgrading involves relaying both tracks with secondhand 115-pound welded rail, surfacing and tie [497] work, and installation of bidirectional Automatic Block Signal systems. Installation of power switches in the interlocking plant at Troost Avenue with the ICG and KCS and at the east end of the lead to the ICG Lydia Avenue Yard is also proposed. In addition, a second power-operated connection between KCT and MP tracks will be built at Troost Avenue to permit double track operations between MP and KCT tracks 80 and 81.

In its reply brief KCS asserts that upon consummation of consolidation 729 more cars will move through Broadway Interlocking in Kansas City per day than the number now moving through this area. KCS implies this increase in traffic will add to the problem of congestion at the Broadway Interlocking Plant. KCS has taken exception to the applicants' claim that a 315 car increase in Kansas City results in approximately three trains a day, and argues that 729 cars will actually require nine additional trains per day. We agree with KCS that 315 cars per day probably will require more than three additional trains per day.

The applicants' position is that whatever the increase in car movements through Broadway, a substantial portion of these cars will be in run-through trains which will ultimately reduce congestion at Broadway. We find the position of applicants to be an accurate reflection of

post-consolidation operations. The increase of run-through trains passing through the elaborate Broadway Interlocking complex will result in a reduction in the number of yard-to-yard-transfer runs in the entire terminal area; a reduction in the average number of cars in these transfer movements will also occur. A reduction both in the number and size of these movements will reduce the possibility of congestion and this reduction will offset any congestion created by an increase in the number of run-through trains.

While there is some evidence concerning congestion in Kansas City, the proposed operation by UP-MP should not have a significant impact on that problem. With the proposed improvements of Tracks 80 and 81 of the KCT, along with new connecting tracks at Big Blue Interlocking and new power crossovers west of the applicants' Kaw River Bridges, the ability of all carriers to adjust to disruptions within the terminal will be greatly enhanced. The upgrading of tracks 80 and 81 requires the approval and funding of the Board of Directors of the KCT. Without this approval, the rehabilitation will not take place. The traffic flow then would increase on the four-track passenger mains. The concentration of traffic in this portion of the terminal would adversely impact on all carriers.

In *Tucumcari*[20] we found there was sufficient capacity in Kansas City to handle not only SSW's new traffic but also protestants' increased traffic. [498] In authorizing the merger of *BN-Frisco*, 360 I.C.C. at 940, we stated that "the merged company will also be able to provide coordinated train schedules, yard consolidations, preblocking, and creation of new run-through train service to alleviate congestion at Kansas City and St. Louis on traffic bound to points on the extremities of its system."

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[20] *St. Louis S.W. Ry.-Pur.-Rock Island (Tucumcari)*, 363 I.C.C. 319 (1980).

The rehabilitation of the North End Freight Line will give considerable operational flexibility to the applicants, the KCT, and other carriers serving the greater Kansas City terminal area. This is not to say that congestion will not ever take place in Kansas City, or that car and/or train delays will never occur in this terminal. While congestion and delay will take place from time to time, regular delays will not occur at any particular place or time. With the upgraded North End Freight Line, the ability to adjust operations through flexible traffic flows will enhance the expeditious movements of traffic for all carriers in the terminal.

While the $4.3 million cost of upgrading KCT tracks 80 and 81 will be an initial expense of KCT, ultimately the cost will be borne by the railroads using these tracks pursuant to zone charges. This route is available to all rail carriers serving Kansas City. However, because this is the primary route that applicants will use through Kansas City, they will pay the greater share of this rehabilitation expense.

Equipment Utilization

The applicants' equipment utilization plan proposes to take advantage of the complementary peak seasonal demands on the constituent railroads, which will have a combined fleet of over 126,000 freight cars. Centralized and computerized control over equipment distribution and repair will provide efficient operations and reduce overall transit time. It will enable the system to reduce empty cross-hauls, to ensure that equipment is repaired at the nearest shop, to reduce transit time and car hire charges, and to improve equipment availability. Applicants project a 3 percent gain in fleet efficiency, which will produce substantial dollar savings to them, and reduced car hire and inventory costs to shippers. Annual cost savings due to improved equipment utilization will

be over $32 million. A discussion of applicants' equipment utilization study appears in Appendix H.

Mechanical and Maintenance-of-Way Coordinations

The consolidated system will be able to achieve significant cost reductions through more effective use of the applicants' mechanical and repair facilities and through coordination of maintenance-of-way activities. The [499] bulk of the savings will be realized in four general areas: (1) coordinated repair of rolling stock; (2) manufacture and reclamation of equipment and equipment components; (3) shared use of maintenance-of-way equipment and materials; and (4) administrative coordinations.

Coordinated repair of freight cars and locomotives will result in substantial cost-savings. The applicant carriers each have shops and repair facilities at common points. The closing of a facility by transfer of the work and personnel to another facility in a terminal will produce significant savings. The coordinated use of various shops with certain specific repair functions will avoid the necessity for the consolidated system to invest in new facilities.

The new system will realize substantial savings annually through the coordinated use of the applicants' equipment manufacturing and component repair and reclamation facilities. The largest savings will be obtained by using UP's car-building facility at Albina, OR for construction of hopper cars for WP and MP. Other savings will be effected through the use of MP shops at Sedalia and De Soto, MO for construction of UP cabooses, and at North Little Rock and Omaha for various component fabrications and repairs.

Of the $19.5 million savings anticipated from coordinations of various shop and repair facilities, approximately $9.6 million reflect savings due to internalized

production which we do not consider to be public benefits. As we stated in *CSX*, 363 I.C.C. at 561, and *Norfolk-Southern*, 366 I.C.C., at 210, internalized production as anticipated here cannot be considered a public benefit unless applicants have shown that their variable costs of production are lower than those of other manufacturers. The cost to society of producing a car is the incremental cost of resources required to produce that unit, and not the market price of the car. The market price reflects fixed costs, which will be incurred by all car manufacturers regardless of where UP's cars are purchased. The annual savings of $9.6 million which the system will achieve due to producing goods or services internally which the component railroads now purchase in the marketplace is a private benefit of the transaction.[21]

Further savings will be realized by the use of major shops such as Omaha and North Little Rock for rebuilding and fabrication of system locomotive and freight car components. The consolidated system will [500] obtain savings through the shared access to maintenance-of-way equipment and materials. Principal areas of savings will be in reduced transportation costs and lower costs of maintenance-of-way materials. Other areas of savings will be realized through more efficient use of maintenance-of-way equipment. For example, ties needed for the eastern portion of UP's lines can be treated at the MP's tie plant at Little Rock rather than at UP's Laramie, WY facility,

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[21] We do consider the $20,000 annual savings due to UP's use of MP's freight car doors to be a public benefit. This reflects the savings to UP to acquire doors which MP manufactures for itself under patent. There is evidence that the doors are more efficient than those otherwise available, and the public will benefit not only from the cost savings but by expanding the use of an efficient door to shippers who would not receive that benefit without consolidation.

The $4.1 million in manufacturing and rebuilding savings, which are presently done internally and will be switched from one carrier to another are public benefits, and are reflected in Attachment A of Appendix H.

saving considerable transportation costs. WP and MP will be able to use UP's specialized ballast cars during winter months when such equipment cannot be used on UP's lines due to weather conditions.

Administrative coordination of mechanical and maintenance-of-way functions will result in annual savings primarily as a result of the consolidation of UP and WP mechanical and maintenance departments. Joint purchases will permit volume discounts offered by equipment manufacturers. These coordinations will result in savings of about $1.5 million annually.

Management Information Services and Communications Operations

The consolidated carriers will fully coordinate through the common policy direction of PRSI the functions of UP's Complete Operating Information System (COIN) and MP's Transportation Control System (TCS). These systems will be directly linked to one another. This direct interconnection will ensure operational reliability and facilitate efficient operations by the new system. With respect to the WP system, it will be completely converted to the UP's COIN system. UP and WP communication organizations will be integrated; the MP and UP communications system is already connected at Kansas City. Upon consolidation this link will be expanded to support smooth and efficient single-system operation.

These management and communication links will serve several objectives, such as to ensure efficient single system operations, more efficient use of freight cars and locomotives, and faster tracing of shippers' cars over the applicants' lines. Annual savings should exceed $1.5 million.

Further savings are anticipated through the use of UP's Automated Claims Processing System. This computerized system permits electronic collection of support

data essential to review freight claims. It will further support a large, uniform data base to furnish statistical claim analysis for the purpose of identifying recurring claim patterns, enabling the carriers to focus on particular causes of freight loss.

About $3.6 million in annual fuel savings will be realized as a result of intermodal traffic diversions from truck to rail and through internal rerouting of traffic by the new system.

[501] *Financial Viability*

The consolidated system will be financially viable. UPRR and MPRR are viable and are financially healthy. They have been consistently and increasingly profitable in recent years (see Appendix J). WPRR is financially viable at present. Its financial position is not strong, however, and it incurred a loss in 1981 (see Appendix J). As part of the consolidated system WPRR will significantly improve its financial position.

Although applicants are all viable at present, and UPRR and MPRR are financially strong, none of the applicants has adequate revenues pursuant to 49 U.S.C. 10704(a). *See Railroad Revenue Adequacy—1980 Determination*, 365 I.C.C. 285 (1981). The proposed consolidation will strengthen applicants financially and the estimated total net annual benefits of the transactions, about $85 million, will help the applicants to approach adequate revenues.

Conclusion

We conclude that the proposed consolidation of UP-MP-WP will result in substantial public benefits. Shippers and the general public will benefit by the improved efficiency and reliability of single system service, as well as the efficiency related savings of $47 million annually. These savings are likely to result in rate decreases,

deferrals of rate increases, and a more financially viable system. The additional $38 million in private benefits will further aid the system in remaining financially viable and competitive.

COMPETITION

The competitive impact of a consolidation proposal is a major factor in our consideration of the public interest because under most conditions strong competition promotes efficiency. We have historically considered competition in our balancing of the public interest in rail consolidation proceedings. In *Seaboard Air Line R. R.—Merger—Atlantic Coast Line R.R.*, 320 I.C.C. 122, 128-29 (1973) we observed "Our primary task is to reconcile the objective of 'preventing injurious waste and in securing sure efficient transportation,' * * * with the general concern of Congress 'that tendencies toward concentration in industry are to be curbed in their incipiency * * *.' In short our problem is one of accommodation of section [11343] and the antitrust legislation." See also *BN-Frisco*, 360 I.C.C. at 932-33; *Tucumcari*, 361 I.C.C. at 340-41; *CSX*, 363 I.C.C. at 550-51. The [502] Staggers Act codified the need to evaluate competition in consolidation proceedings by adding a fifth factor to 49 U.S.C. 11344(b).[22]

While the Staggers Act simply codified the need to consider competitive effects of consolidations, it has ac-

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[22] Section 228(a)(2) of the Staggers Act requires us to consider "whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region." We are aware that 49 U.S.C. 11344(b)(5) does not specifically apply to this proceeding. However, the new provision has simply codified our past practice. In explaining the purpose of this provision, its sponsor, Congressman Leon Panetta noted that competition already "plays an important role in the Commission's decision making in railroad mergers. This is as it should be. My amendment would insure that this remains the case." 126 Cong. Rec. H8604 (daily ed. Sept. 9, 1980).

tually increased the need to identify carefully any anti-competitive effects and to balance those effects against the benefits of a transaction. Prior to the Staggers Act the emphasis of the National Transportation Policy, 49 U.S.C. 10101, was "on achieving an adequate, efficient, and economical system of transportation through close supervision of business operations and practice rather than through heavy reliance on the enforcement of free competition * * *" *McLean*, 321 U.S. at 83. The new Rail Transportation Policy, 49 U.S.C. 10101a, included as section 101 of the Staggers Act, adopted new policies in regulating the railroad industry. It is the policy of the United States Government "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail * * *" 49 U.S.C. 10101a(1). The new policy favoring increased reliance on competition to regulate activities will govern the environment in which the new system will operate. The ability of the railroads to take various actions free of regulatory restraints will make it easier to exert or abuse market power gained as a result of consolidation. For these reasons we must take even greater care to identify harmful competitive effects and to mitigate those effects where possible.

While we are cognizant of the increased importance of our competitive analysis, *Railroad Consolidation Procedures*, 363 I.C.C. at 791 and 49 CFR 1111.10(a) (1981) (now codified at 49 CFR 1111.1(a)), we reject the contention that antitrust considerations might assume controlling importance in railroad consolidations after the Staggers Act. The Supreme Court has clearly held that the Commission is not an antitrust court, and cannot enforce the Sherman Act.[23] While we do have

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[23] "The Commission has no power to enforce the Sherman Act as such. It cannot decide definitely whether the transaction contemplated constitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act. The Commission's task is to en-

concurrent jurisdiction to enforce section 7 of the Clayton Act,[24] in the context of a pro- [503] posed rail consolidation our primary inquiry is conducted under the terms of the Interstate Commerce Act. We will continue to examine consolidations under the terms of the Interstate Commerce Act where competition is but one factor, albeit an important one, in determining the public interest. Nonetheless, the principles of the antitrust laws, specifically of section 7 of the Clayton Act, and sections 1 and 2 of the Sherman Act[25] provide substantial guidance in our assessment of the competitive impact of rail consolidations under the Interstate Commerce Act.

In the following discussion we will evaluate competitive effects by defining existing markets, measuring the anticipated effects in those markets, and determining whether the anticipated effects in those markets are substantial. We also will determine whether adverse competitive effects of the proposed transactions can be ameliorated by means available to us under the Interstate Commerce Act. In light of the importance of railroads in the transportation of coal, we will discuss the impact of the proposed transactions on coal separately after examining the general competitive effects.

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force the Interstate Commerce Act and the legislation which deals specifically with transportation facilities and problems." *McLean*, 321 U.S. at 79.

[24] 15 U.S.C. 18 (1981). Mergers subject to section 7 are prohibited if their effect "may be substantially to lessen competition, or to tend to create a monopoly." Section 11 of the Clayton Act, 15 U.S.C. 21 (1981), confers jurisdiction on both the Commission and DOJ to enforce section 7 of the Act as to regulated carriers. *See Denver & R. G. W. R.*, 387 U.S. 495.

[25] 15 U.S.C. 1, 2 (1981). Mergers subject to section 1 are prohibited if they constitute a "contract, combination * * *, or conspiracy in restraint of trade." Section 2 provides criminal penalties for persons "who shall monopolize, or attempt to monopolize, or combine or conspire to monopolize trade * * *".

Market Definition

The first step in analyzing any consolidation is to define the markets that the merger is likely to affect. A relevant market is the "area of effective competition," *Standard Oil Co.* v. *United States*, 337 U.S. 293, 299-300 n.5 (1949), and necessarily has two dimensions, product and geographic. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 324 (1962) (*Brown Shoe*). Relevant markets must be defined in terms of commercial realities, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 572 (1966).[26]

Product Market. A relevant product market requires a grouping together of products that are "reasonably interchangeable." *United States* v. *E. I. duPont de-Nemours & Co.*, 357 U.S. 377, 395 (1956). In *Brown Shoe*, 370 U.S. at 325, the Court looked to the "cross-elasticity of demand between the product itself and substitutes for it" and "the [504] reasonable interchangeability of use * * * between the product itself and substitutes for it."

The "product" sold by railroads is the transportation of freight. The first issue to be resolved in this proceeding is whether motor carrier freight transportation

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[26] In the United States Department of Justice Merger Guidelines, issued June 14, 1982, the market definition used by the Department was stated formally as follows: "a market consists of a group of products and an associated geographic area such that (in the absence of new entry) a hypothetical, unregulated firm that made all the sales of those products in that area could increase its profits through a small but significant and non-transitory increase in price (above prevailing or likely future levels)." Merger Guidelines issued June 14, 1982, page 4 n.6.

The Merger Guidelines indicate the policy of the Department of Justice, but they are not binding on the Department, the courts or this Commission. *United States* v. *Atlantic Richfield Co.*, 297 F. Supp. 1061 (S.D.N.Y. 1969), *aff'd sub nom. Bartlett* v. *United States*, 401 U.S. 906 (1971).

should be included in the same product market as rail freight transportation for determining competitive impacts of the proposed transactions. Applicants argue that motor carriers are competitive for most markets and should be included in our analysis. Most other parties argue that rail transportation should be analyzed separate product market. This is not to say that motor carriers do not present substantial competitive constraints to railroad market power,[27] only that, at the margin, motor carriers are unlikely to be direct substitutes for rail transportation in the markets affected by the proposed transactions. In such circumstances a rise in rail rates would not necessarily result in a significant amount of traffic shifting between modes and the railroad could effectively increase its profit by raising its rates absent other competitive factors.

Our treatment of rail freight transportation is consistent with cases decided under Clayton section 7 where it is rare to group technically different products or services in the same product market. In *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 356-57 (1963) (*Philadelphia National Bank*), the Supreme Court found commercial banking to be a separate line of commerce despite the offering of numerous services interchangeable with commercial banking services by savings and loans, credit unions, and various credit companies. The Court has also found that the market for aluminum conductors was a separate product market despite their almost complete interchangeability with

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[27] Motor carriers handle almost two-thirds of the nation's intercity freight tonnage and we have recognized the general restraining effect of intermodal competition upon railroad operations. *See Norfolk Southern*, 366 I.C.C. at 221 and 223; *Guilford Transportation Industries, Inc.-Control-D&H Ry. Co.*, 366 I.C.C. 396 (1982); and *Guilford Transp. Industries, Inc.-Control-B&M Corp.*, 366 I.C.C. 294 (1982). Motor carriers often provide an umbrella, or cap, on the ability of railroads to raise rates. However, the viability of this constraint generally depends upon the commodity transported and the distance moved.

copper conductors. *United States* v. *Aluminum Company of America*, 377 U.S. 271, 275 (1964) (*Aluminum Company*).

Finally, evaluation of rail freight transportation as a separate product market is consistent with the mandate to consider "whether the proposed transaction would have an adverse affect on competition among rail carriers in the affected region." 49 U.S.C. 11344(b)(5).

Geographic Market: Like product markets, geographic markets must "correspond to economic realities." *Brown Shoe*, 370 U.S. at 336. In Clayton section 7 cases the relevant geographic market has been described as the area in which providers of a particular product or service operate and to which purchasers can turn for such products or services. *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327 (1961) (*Tam-* [505] *pa Electric*). The geographic market, referred to in Clayton section 7 as "any section of the country," was found in *Brown Shoe*, 370 U.S. at 328, 340, to include markets as small as individual cities and a market as large as the entire country. It is necessary also to examine any "economically significant submarket" where the effect of the transaction "may be substantially to lessen competition." 370 U.S. at 325. See also *United States* v. *Lever Bros. Co.*, 216 F. Supp. 887 (S.D.N.Y. 1963).

For the reasons set forth below, we have determined that relevant geographic markets in this proceeding are (1) transcontinental traffic (a) over the central corridor and (b) over all routes; (2) Midwest traffic (a) between Omaha/Council Bluffs and Kansas City, (b) between points in Kansas, and (c) between the upper Midwest and the Gulf of Mexico; and (3) traffic between points on the West Coast.[28]

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[28] We note that the distinctions between product and geographic markets are not as clear in transportation as they are in other industries, for carriers, in particular railroads, effectively sell their geography.

Competitive Effects

Section 7 of the Clayton Act was enacted "to create an effective tool for preventing all mergers having demonstrable anticompetitive effects * * *" *Brown Shoe*, 370 U.S. at 319. In order to identify those effects the Court in *Brown Shoe* looked separately at the horizontal and vertical aspects of the proposed consolidation. Horizontal consolidations were defined to be "economic arrangement[s] between companies performing similar functions in the production or sale of comparable goods or services," 370 U.S. at 334. Vertical consolidations were defined to be "economic arrangements between companies in a supplier-customer relationship * * *" 370 U.S. at 323.

In the context of railroad consolidations, the Commission has analyzed competitive effects of proposed transactions in terms of parallel and end-to-end effects. *Norfolk Southern*, 366 I.C.C. at 216 and *Railroad Consolidation Procedures*, 363 I.C.C. 784. While these terms are roughly analogous, analysis in terms of the actual lines of railroad, i.e. parallel and end-to-end, rather than the theoretical function served by those lines, i.e. horizontal or vertical effects, provides a clearer approach to identifying competitive problems in rail consolidations. This is especially true where, as in this proceeding, elements of each effect are present Various lines of railroads can fulfill both theoretical roles,[29] customer- [506] supplier (or vertical) and direct competitor (or horizontal) and

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[29] We reject the argument offered by the Santa Fe that since one connection does not receive payment from the other in return for delivering interline rail traffic to that connection there can be customer-supplier or vertical relationship. Santa Fe argues that only railroad mergers with shippers or consignees can be considered vertical. Originating railroads have substantial control over the traffic on their lines and often determine the route, gateway, and/or connecting carrier over which their traffic will move. In this sense it is clear that the originating road is a "supplier" of traffic to its connecting carriers.

it becomes difficult to segregate competitive effects along clear horizontal or vertical lines. Many of the major parties, including DOJ, also adopted this approach in arguing their positions. We will discuss specific vertical or horizontal effects as they appear.

Parallel Effects: While the proposed transactions are primarily end-to-end in nature, there are substantial parallel aspects. These aspects of the transaction must be examined closely, for they will generally eliminate competition between the consolidating railroads.

The record indicates four areas where UP and MP or WP lines are parallel: transcontinental traffic both through the central corridor and over all routes, the Kansas City-Omaha corridor, Kansas, and the West Coast.

Transcontinental traffic: UP, MP and WP each presently participate in the movement of transcontinental traffic. WP serves points in northern California and interchanges traffic with UP and DRGW at Salt Lake City.

MP participates in traffic to and from points in northern California and Oregon over its central corridor line to Pueblo where it also interchanges with DRGW. MP also participates in traffic to or from California points over its line to El Paso. On its southern corridor route MP interchanges traffic with ATSF at Sweetwater, TX, and with SP at El Paso.

UP provides direct services from Kansas City to the Pacific Northwest and to Los Angeles. UP also participates in northern California traffic through interchange with the SP at Ogden, UT, and with the WP at Salt Lake City.

Because the consolidated system will reach all five of the major midcontinent gateways[30] as well as major mar-

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[30] Chicago, St. Louis, Kansas City, Memphis, and New Orleans.

kets and ports on the West Coast, we are concerned with the potential impact of the transactions on transcontinental traffic. Applicants presently compete primarily through various interline routes in the provision of transcontinental service to and from northern California[31] over the central corridor (for example, WP-DRGW-MP and SP-UP or SP-DRGW-MP).[32]

WP operates primarily in the central corridor and is one of three major railroads serving northern California (along with SP and ATSF). The UP operates as one of two bridge carriers in the central corridor over the continental divide (along with DRGW). Finally, MP operates as one of several routes connecting with DRGW for transcontinental traffic moving east of Denver over the Great Plains (Pueblo to Kansas City). The [507] MP interline route is a direct competitor of the UP for traffic moving to and from Kansas City. The central corridor is clearly the area in which the applicants' transcontinental rail freight operations are concentrated and is, therefore, a relevant geographic market for our competitive analysis. *Tampa Electric*, 365 U.S. at 327.

We will discuss first the competitive impacts in the central corridor. Then we will analyze other transcontinental routes under the second part of the *Tampa Electrict* test—the area to which purchasers can practicably turn for transcontinental rail freight service.

(1) *Central corridor.* The central corridor (also known as the overland route) has traditionally been recognized as a separate market with a "natural advantage" for certain transcontinental traffic. *Tucumcari*, 363 I.C.C. at

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[31] Shippers at points in southwest Oregon served by SP generally use the SP-UP service over Ogden for transcontinental traffic.

[32] MP also competes for traffic over its southern corridor route to El Paso. We will discuss this route *infra*.

383.[33] However, measuring the central corridor market, and railroad markets in general, is complicated by the presence of extensive interlining.

Congress neither adopted nor rejected specifically any tests for measuring relevant markets in Clayton section 7, *see Brown Shoe, supra.* Nor has this Commission adopted specific tests for analyzing competitive effects under the Interstate Commerce Act. In the past, we have used techniques analyzing traffic flows in regional corridors, *Tucumcari*, 363 I.C.C. at 349, 415-17 and *CSX*, 363 I.C.C. at 565-67; State-to-State traffic flows, *Norfolk Southern*, 366 I.C.C. at 216-19; and point-to-point traffic flows, *CSX*, 363 I.C.C. at 564. To assist in measuring the markets in this proceeding we made available to the parties our 1979 one percent waybill sample. Additionally, we required five of the major railroad parties to provide a two percent sample of all transcontinental traffic handled by their systems in 1979.[34] The following tables indicate the market shares held by various central corridor routes for traffic moving between northern California and Oregon and eight regions:[35]

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[33] When SP was authorized to control the Central Pacific Railway Company (CP), the approval was conditioned on a requirement that SP preferentially solicit traffic between points in southern Oregon and central California, on the one hand, and certain points in the East and Midwest, on the other, for interchange at Ogden with UP. *See Central Pac. Ry. Co. Control*, 76 I.C.C. 508 (1923). Later modification permitted solicitation via DRGW. *See Central Pac. Ry. Co. Control*, 328 I.C.C. 345 (1966) (*Central Pacific*).

[34] Finance Docket No. 30,000, *Union Pacific Corporation and Union Pacific Railroad Company-Control-Missouri Pacific Corporation and Missouri Pacific Railroad Company, Southern Pacific Transportation Company-Petition for Access to Certain Data*, (not printed) decided December 19, 1980.

[35] These market shares are based on the two percent transcontinental traffic sample.

Table 1

Percentage Market Shares

To/From Northern California

Corridor	W. Northeast	Mid Atlantic	New England	All Eastern	North Southeast	South Southeast	All South	North Central	Mid Central	South Central
Northern	.3	.3	.6	.3	.1	.1	.1	6.8	.3	.0
Central	63.9	58.6	60.1	62.0	35.8	34.0	35.0	70.2	79.3	14.2
Southern	35.7	41.1	39.3	37.6	63.9	65.9	64.8	23.0	20.3	85.8
Other	.1	.0	.0	.0	.1	.0	.1	.0	.1	.0
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Central Corridor										
SP-UP	53.8	44.1	54.8	51.1	42.3	44.3	43.2	59.7	50.1	20.4
SP-DRGW	12.4	13.5	7.7	12.4	11.7	12.3	12.0	14.3	17.7	25.6
WP-UP	18.8	28.0	24.5	21.8	32.7	26.3	29.9	20.5	23.9	18.2
WP-DRGW	14.9	14.4	12.0	14.5	12.8	16.2	14.3	5.2	7.8	35.8
Other	.2	.0	1.0	.2	.4	.9	.6	.3	.5	.0
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

Total may not equal 100 due to rounding.

Table 2

Percentage Market Shares

To/From Oregon

Corridor	W. Northeast	Mid Atlantic	New England	All Eastern	North Southeast	South Southeast	All South	North Central	Mid Central	South Central
Northern	32.7	21.4	18.1	28.5	19.7	23.5	21.5	61.0	20.2	13.3
Central	61.9	62.0	62.5	62.0	62.2	52.2	57.4	37.5	77.0	44.5
Southern	5.4	16.6	19.4	9.5	18.1	24.3	21.1	.7	2.7	42.2
Other	0	0	0	0	0	0	0	.9	0	0
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.00	100.0
Central Corridor										
SP-UP	19.1	25.8	37.0	22.4	17.3	34.8	25.0	34.9	24.7	23.1
SP-DRGW	10.9	23.4	17.0	14.7	8.9	8.6	8.7	8.1	17.9	25.5
WP-UP	0	0	0	0	0	.5	.2	0	0	0
WP-DRGW	.5	.7	3.0	.8	0	.5	.2	1.7	.7	4.3
Other*	69.5	50.2	43.0	62.1	73.8	55.6	65.8	55.2	56.7	47.1
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

* Predominatly reflects northern UP-UP overland route.

Totals may not equal 100 due to rounding.

[510] The parties have adopted various techniques for measuring the competitive impacts of the proposed transactions as described in Appendix E-2. While their approaches differ, the analyses of competitive impacts in the central corridor predicted very similar results.

The approach adopted by the DRGW provides a good basis for discussion of the competitive impacts. DRGW observes that, although shippers arrange for through shipment of their goods, rail transportation via the central corridor is in effect a three stage process. Eastbound traffic moves first to the Utah gateways (Ogden or Salt Lake City) over either SP or WP, then over the Continental Divide on UP or DRGW, and then east across the Great Plains on the ATSF, MP, BN or UP. Viewed in this context, the principal horizontal [36] effect of the consolidation is the overlap on the easternmost segment between the UP and MP. This is the effect of most concern.[37] At present, the ability of UP to exert market power [38] over traffic moving through Cheyenne is constrained by the ability of shippers to switch to the DRGW using either ATSF, BN or MP as an eastern connection. The proposed consolidation would eliminate the MP as an

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[36] The UP and MP lines east of Denver are direct competitors in the provision of transcontinental service and their consolidation gives rise to a horizontal effect under the standard antitrust definition.

[37] The Department of Justice Merger Guidelines, issued June 14, 1982 at 16. *See also R. Posner, The Chicago School of Antitrust Analysis*, 127 U. Pa. L. Rev. 925, 936-38 (1979); Areeda & Turner, II *Antitrust Law* at 269 73 (1978).

[38] Market power is defined in the Merger Guidelines, *supra*, at 2-3, as the "ability of one or more firms profitably to maintain prices above competitive levels for a significant period of time * * *". Sellers with market power also may eliminate rivalry on variables other than price. Buyers with market power can depress the price paid for a product to a level below the competitive price and may also influence variables other than price. In either case "market power" has wealth transfer and resource misallocation effects.

independent connection for the DRGW alternate routing and thereby enhances the UP's ability to exert market power.

The following tables illustrate the significance of this horizontal effect. Table 3 shows all traffic moving west on the central corridor overland carriers (UP and DRGW) that originated east of the Cheyenne-Denver-Pueblo interchanges. In 1979, 75.7 percent of such traffic was handled by UP—73.9 percent moving via Cheyenne and 1.8 percent forwarded by UP to DRGW at Denver. Based on present market shares of this traffic, consolidation of UP and MP would raise the UP system share of this traffic to 85.1 percent.

[511]

TABLE 3

Market Shares in Central Corridor, East of Denver Westbound, Traffic, 1979

Forwarding carrier	Receiving carrier		
	UP	DRGW	Total
	Percent		
UP	73.9	1.8	75.7
MP	0.1	9.3	9.4
BN	2.0	5.4	7.4
ATSF	0.7	2.3	3.0
CRIP	0.3	2.2	2.5
Others	0.4	1.6	2.0
Total	77.4	22.6	100.0

Source: 1979 One Percent Waybill Sample.

Note: The column for UP interline receipts includes only eastern Colorado receipts. All other receipts by the UP are considered UP through traffic (i.e., UP-UP).

Table 4 shows the market for traffic moving east in the central corridor that terminated east of the Cheyenne-Denver-Pueblo interchanges. Again the UP position is substantial. UP handled 78.0 percent of this traffic—75.5 percent over Cheyenne and 2.5 percent received from

DRGW at Denver. Based on present market shares the UP-MP consolidation would raise the UP system share of eastbound traffic in this corridor to 85.5 percent.

TABLE 4

Market Shares in Ceneral Corridor, East of Denver Eastbound Traffic, 1979

Receiving carrier	Forwarding carrier		
	UP	DRGW	Total
		Percent	
UP	75.5	2.5	78.0
MP	—	7.5	7.5
BN	0.6	5.4	6.0
ATSF	0.4	4.6	5.0
CRIP	0.4	2.0	2.4
Others	0.1	1.0	1.1
Total	77.0	23.0	100.0

[512]

Source: 1979 One Percent Waybill Sample.

Note: The column for UP interline transfers includes only Colorado transfers. All other transfers from the UP are considered UP through traffic (i.e., UP-UP).

While increased market share is not alone dispositive of the question of whether a proposed consolidation will result in a substantial lessening of competition, it is one of the most important factors in analysis under Clayton section 7. *Brown Shoe, supra.* Market share statistics of the magnitude present in the central corridor east of Denver, both presently and those projected after consolidation, are extremely high by conventional antitrust standards [39] and indicate a substantial competitive effect arising from the proposed transaction.

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[39] *See Pac. Coast Agr. Export Ass'n* v. *Sunkist Growers, Inc.*, 526 F.2d 1196, 1204 (9th Cir. 1975) *cert. denied*, 425 U.S. 959 (1976) which held that a defendant with market share ranging between 45 and 70 percent held monoply power; Areeda & Turner III *Anti-*

Tables 3 and 4 analyze the market impacts of the proposed UP-MP consolidation, but do not address the impact of the UP-WP consolidation. An alternative approach to measuring competition in the central corridor is to consider the entire transcontinental movement as a unit in which the consolidated UP-MP-WP system will have significant influence over traffic now handled by the independent components. Tables 5 and 6 reflect this analysis in terms of the percentage of central corridor traffic in which the applicant carriers participate. This type of analysis is not the same as the examination of market shares set forth in Tables 3 and 4. Tables 5 and 6 reflect applicants' participation in markets where they do not directly compete, i.e. west of Ogden and over the Continental Divide. However, the participation shares do provide a rough means of gauging the overall strength of the applicants' position as a consolidated system in the central corridor, a market characterized by the extensive interlining which makes measurement of railroad markets difficult. The participation shares provide some indication of the degree to which applicants individually and jointly can exercise some control over the traffic moving in the central corridor through their rate and service policies. This type of analysis also reflects the competitive effect of a structural change in the railroad industry embodied in the reduction of effective options avaiable [sic] to shippers.[40]

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trust Law, supra at 292 (market share of 75 percent is a benchmark for market power). Mergers producing firms with a market share of 30 percent or less have been held to violate section 7. *Philadelphia National Bank*, 374 U.S. 321. *See also* Areeda & Turner IV *Antitrust Law, supra* at 31, 34-51.

[40] We note that a simple reduction in the number of carriers competing in a market is not alone indicative of reduced shipper options. For example a merger of two carriers which are providing joint-line service between two points when another carrier is providing single-line service between those points does not reduce shipper options. *See Norfolk Southern*, 366 I.C.C. at 227-28.

[513] Table 5 reflects all transcontinental traffic originating in northern California [41] that moves east over the central corridor over which the UP, MP, or WP now have influence.

TABLE 5

UP-WP-MP Share of Northern California Originations Moving Via Central Corridor, 1979

Route		Percentage Share of Tonnage
UP		65.9
from WP in Salt Lake City	16.7	
from SP in Ogden	49.1	
WP		16.9
to DRGW in Salt Lake City		
MP		6.7
from DRGW in Pueblo		
Total UP-WP-MP		89.5

Source: 1979 One Percent Waybill Sample.

Notes: (1) The WP share excludes all traffic handled by the UP. Thus, the WP-DRGW entry excludes WP-DRGW-UP movements.

(2) The MP share excludes traffic handled either by the UP or WP. Thus, it includes only movements such as SP-DRGW-MP.

(3) Detail may not add to total due to rounding.

The UP section of the table indicates that in 1979 UP participated in moving 65.9 percent of the northern California originated tonnage moving east over the central corridor. The WP portion of Table 5 indicates the tonnage that moved over WP, but not over UP. Adding the WP to the UP system raises the UP's participation share by 16.9 percentage points. The MP portion of the table shows northern California traffic handled by MP, but not by either UP or WP.[42] Adding the MP raises the UP

[41] This reflects northern California traffic—the area in which WP operates. Numerous shippers in southern Oregon served by the SP also will be affected by competitive impacts in the ceneral corridor.

[42] Generally this traffic originated on SP, was forwarded to DRGW at Ogden, and to MP at Pueblo.

participation share by 6.7 percentage points. Using this analysis the post-consolidation participation share of the UP system for eastbound, central corridor, transcontinental traffic will total 89.5 percent.

A similar analysis in Table 6 indicates a post-consolidation UP participation share for westbound, central corridor, transcontinental traffic of 86.1 percent.

[514]

TABLE 6

UP-WP-MP Share of Northern California Terminations Moving Via Central Corridor, 1979

Route		Percentage Share of Tonnage
UP		65.8
to WP in Salt Lake City	15.5	
to SP in Oregon	50.3	
WP		13.7
from DRGW in Salt Lake City		
MP		6.5
to DRGW in Pueblo		
Total UP-WP-MP		86.1

Source: 1979 One Percent Waybill Sample.

Notes: (1) The WP share excludes all traffic handled by the UP. Thus, the DRGW-WP entry excludes UP-DRGW-WP movements.

(2) The MP share excludes traffic handled either by the UP or MP. Thus, it includes only movements such as MP-DRGW-SP.

(3) Detail may not add to total due to rounding.

To the extent that the consolidated system is able to retain or increase the traffic in which its component carriers now participate, the participation shares represent the same type of potential anticompetitive effect reflected by conventional market share measurements-increased potential for collusion or price leadership. The participation shares are not a direct measurement of market changes and may not reflect the actual market

position of the applicants after consolidation. We expect substantial competitive responses from nonapplicant competing carriers to limit applicants' ability to realize the predicted participation.

Tables 5 and 6 indicate that the magnitude of the competitive effects of the proposed consolidations on traffic in the central corridor will largely be determined by the ability of DRGW and SP to fashion effective competitive responses to the consolidated system. Yet vertical effects of the proposed transactions will affect both SP's and DRGW's ability to respond. A vertical effect can occur if one of the consolidating carriers formerly interchanged traffic with both its consolidation partner and other carriers in providing joint line services over a particular gateway. The transaction then may result in the foreclosure of the nonincluded carrier from competing in the markets it formerly served.

SP and WP now compete on the westernmost leg of the overland route. UP (or DRGW) presently has no incentive to favor either WP or SP on traffic moving to northern California. As illustrated in Table 1, *supra*, the UP-SP interchange over Ogden handles a large share of central [515] corridor traffic. SP currently interchanges about 70 percent of its central corridor traffic with UP and 30 percent with DRGW.

After consolidation UP will favor its long-haul via WP on movements to northern California and route traffic away from SP. UP also will be a direct competitor of SP in northern California for the first time and will have an incentive to try and attract as much traffic as possible to the WP line for movement east as well as west. UP acts as a supplier of SP and WP for westbound traffic and as a customer of SP and WP for eastbound traffic. The potential foreclosure of the UP route to SP traffic is a vertical effect of the consolidation.

This effect is mitigated substantially by several factors. First, SP serves exclusively approximately 12,800

shippers in the areas of northern California and southern Oregon compared to about 200 shippers served exclusively by WP. SP's access to such a large number of exclusively served shippers will ensure its continued participation in a large amount of traffic. Since the UP system has no direct access to these shippers, if it is to continue to participate in their traffic it must do so with SP.

Second, the SP route to northern Californa is more efficient[43] than the WP route and to some extent the greater efficiencies available on the SP route will hold some traffic to the SP lines.

Finally, SP will continue to have a viable interline route over the central corridor with DRGW. The efficacy of the DRGW route and SP's ability to successfully shift its traffic to that route are discussed, *infra*, in dealing with the proposed DRGW and SP trackage rights conditions.

DRGW faces a similar loss of connecting carriers, but at both the western and eastern ends of its system. In the West, DRGW will lose WP as a neutral connection and in the East it will lose MP as a neutral connection. The WP-DRGW-MP central corridor route has historically been the major central corridor competitor of the UP-SP route.[44] In the West SP should have a greater incentive to cooperate with DRGW in providing a competitive, alternative transcontinental route because of its own loss of the UP as a neutral connection.

We do not anticipate a substantial adverse effect in the West, only the shifting of DRGW traffic away from WP to SP. This impact is discussed, *infra*, with regard to the rate condition proposed by DRGW.

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[43] The SP route between the Bay area and Utah is approximately 180 miles shorter than the WP route and generally has more favorable grades and curvature.

[44] *See Central Pacific*, 328 I.C.C. 345.

Loss of the MP connection to the East is of greater significance to both DRGW and SP. The MP line between Pueblo and Kansas City is the most direct route for DRGW transcontinental traffic to and from Kansas City (and other Eastern gateways). More significantly MP is DRGW's [516] only connection to the East that does not now operate its own transcontinental route.[45] Loss of the neutral MP connection will require DRGW to interline its transcontinental traffic with carriers that have incentives to use their resources, and route their traffic, elsewhere.

In addition to affecting DRGW traffic, the loss of neutral connections to the East will also affect SP's ability to successfully use the DRGW route as an alternative to the UP overland route. This effect compounds the horizontal impact of the loss of competition between UP and MP over the Great Plains.

DOT conducted a study designed to estimate applicants' ability to favor their long-haul routes and shift traffic away from other routes. This study, therefore, estimates the applicants' ability and incentive to foreclose other carriers at specified gateways.[46] DOT did not

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[45] DRGW's connections to the east are BN (northern corridor), Santa Fe (southern corridor) and UP (central corridor) in addition to MP.

[46] DOT described its study as a study of "market power". However, that description is overstated. As defined, *supra*, market power denotes resource misallocation and the transfer of wealth to a selling firm because of its ability profitably to sustain higher prices or lower service quality. The diversions studied by DOT may include some of these elements, but diversions of this type may also occur because the consolidated firm offers improved service. In fact, as discussed *supra*, single system operations would be expected to generate some traffic diversions based on improved service. Since the diversions identified as "market power" diversions may also be attributable to improved service, we cannot say that the DOT study reflects "market power" in the sense discussed in the DOT Merger Guidelines, *supra*.

address the "market power" impacts on DRGW interchanges, but its conclusion regarding SP interchange at Ogden is consistent with our discussion. DOT estimates that SP may lose approximately 9,100 carloads ($12.6 million) at Ogden with potential additional losses of 53,800 carloads ($39.6 million in revenue) if the SP route does not remain competitive for time-sensitive traffic. It is our opinion that SP's route will remain competitive as described in the sections, *infra*, dealing with proposed conditions. The 9,100 cars DOT projects as a lower bound on diversions attributable to "market power" at Ogden (assuming SP remains competitive for time sensitive traffic) represents something less than 5 percent of the 207,000 car annual SP-UP interchange at Ogden. However, an indeterminate amount of this diversion may be attributable to improved service over the consolidated UP route.

Finally DOT estimated the leverage held by connecting carriers at various interchanges with the UP system. Leverage was defined as the ratio of interchange carloads received from applicants to the number of carloads delivered to applicants at the study gateway. This ratio gives some idea of the competing carriers' ability to take responsive action if faced with long-haul routings via the new system. SP's leverage ratio at Ogden with UP was calculated to be 1.26, the lowest (best) leverage for any study gateway.

[517] These estimates confirm our conclusion that with the conditions imposed, *infra*, SP is properly positioned to take strong competitive action to mitigate the effects of the consolidation. Additionally, the very high remaining levels of UP-SP interchange illustrate that UP will continue to route large amounts of traffic in interline service over SP.[47]

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[47] Both because SP exclusively serves so many shippers in northern California and Oregon, and because the SP route is more effi-

In summary, the UP-MP-WP consolidation creates a serious level of industry concentration in the central corridor submarket. The consolidation also creates a situation where DRGW, and indirectly SP, may be foreclosed from offering effective competitive responses to the consolidation through loss of neutral connections to the east.

(2) *Other transcontinental routes*: We have discussed the effects of the proposed transactions on central corridor—the area in which the applicants primarily operate. To apply the second criterion of geographic market definition—the area "to which purchasers can practicably turn for * * * products of services," *Tampa Electric*, 365 U.S. at 327—we must consider whether users of central corridor rail freight transportation services can practicably turn to other routes for service now obtained over the central corridor.

The question with regard to area and route competition is the ease with which users of central corridor services can switch to alternatives. In this regard, the geographic market definition problem is identical to the product market definitional problem, where the issue was the case with which shippers and consumers can switch among modes.[48] The fact that some shippers use both motor carriers and railroads does not imply that the elasticity of substitution is high, only that the elasticity is greater than zero. Similarly, the fact that northern California producers ship some goods via southern corridor routes and some via the central corridor does not necessarily imply that the substitution elasticity between these markets is high.

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cient than the WP route, UP will continue to have an economic interest in service over SP. *See Traffic Protective Conditions*, 366 I.C.C. 113 (1982).

[48] "The criteria used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market." *Brown Shoe*, 370 U.S. at 336.

No evidence is of record regarding route or area substitution elasticities, nor are we aware of any studies in this area. However, for purposes of the following analysis we will hypothesize that extensive route and area competition exists and analyze the competitive effects on rail transcontinental routes as if they were close substitutes.

Table 1, *supra*, indicates market shares for the major routes for traffic moving between northern California and various regions of the country calculated using the two percent sample generated pursuant to our order [518] of December 19, 1980, in this proceeding. The table indicates that the various transcontinental routes [49] compete with varying degrees of success for northern California transcontinental traffic. The northern corridor BN routes generally are not effective competitors competitors for California traffic.[50] The central corridor routes and the southern corridor routes do compete for northern California traffic from all regions. The central corridor holds 62 percent of the market between points in northern California and points in the East [51] compared to 37.6 percent for the southern corridor. However, the southern corridor holds 64.8 percent of traffic between northern Cali-

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[49] Transcontinental traffic moves over three major rail corridors. The northern corridor consists of two transcontinental routes operated by BN. The central corridor consists of a number of routes each using either the UP or RGW over the Continental Divide. The southern corridor consists of SP and ATSF routes.

[50] BN does hold 6.8 percent of the market between northern California and the North Central States reflecting its extensive trackage in the North Central region.

[51] For this purpose the "East" is a combination of the New England, Mid Atlantic and West Northeast regions as illustrated in Appendix E-4 and summarized in the "All Eastern" column of Table 1.

fornia and points in the South [52] and 85.8 percent of traffic between northern California and points in the South Central region compared to 35.0 percent and 14.2 percent respectively for the central corridor.

ATSF presently has a strong market position in traffic moving between northern California and the East, with 29.2 percent of the New England traffic and 29.3 percent of West Northeast traffic (the region that includes Chicago). SP's strongest positions for northern California traffic are in the South with 38.6 percent of the market and in the South Central region with 56.3 percent of the market. However, the competitiveness of SP's southern route for traffic from the East regions will improve now that its rehabilitation of the Tucumcari line to Kansas City has been completed. *See Tucumcari*, 363 I.C.C. at 347.

The southern corridor routes are competitive for northern California traffic even though they are slightly more circuitous than the central corridor routes to some of the important eastern gateways.[53] Despite its mileage disadvantage Santa Fe sets the industry standard on such time sensitive traffic as TOFC/COFC movements between northern California and Chicago.[54]

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[52] For this purpose the "South" is a combination of the North Southeast and South Southeast regions illustrated in Appendix E-4 and summarized in the "All South" column of Table 1.

[53] Representative mileages along transcontinental routes between Oakland and Kansas City are: ATSF—2066; SP-SSW-2187; WP-UP—2062; SP-UP-1882; and SP-DRGW-BN-2123. Between Oakland and Chicago representative mileages are: ATSF—2516; SP-SSW(KC)-BN—2652; WP-UP-CNW-2407; SP-DRGW-BN-2423; and SP-UP-CNW—2227.

[54] Santa Fe carries nearly two-thirds of the transcontinental TOFC/COFC traffic to and from northern California and is a major rail carrier of perishable traffic.

[519] Although the market share of the southern routes is highest for traffic between northern California and the South Central region, the southern corridor commands a significant market share to each of the other regions.[35] This is clear evidence that the southern and central corridor routes are substitutes for some transcontinental traffic between northern California and all regions and can be analyzed together as integral parts of a broad market for transcontinental rail freight. *See Brown Shoe Co.*, 370 U.S. at 325; *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 619 (1974); *Market Dominance Determinations and Considerations of Product Competition*, 365 I.C.C. 118, 123 (1981).

The same conclusion applies to traffic to and from southern California, except the southern corridor routes are even stronger. Table 7 describes transcontinental routings to and from points in southern California based on the two percent sample.

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[35] The lowest market share for the southern corridor routes is 17 percent to the Mid North Central region. BN's northern corridor route holds an 6.8 percent share of that market.

Table 7

Percentage Market Shares

To/From Southern California

	West Northeast	Mid Atlantic	New England	All Eastern	North Southeast	South Southeast	All South	North Central	Mid Central	South Central
Corridor										
Northern	.1	.1	.4	.1	0	0	0	6.3	.1	0
Central	27.5	28.1	25.5	27.5	14.3	15.1	14.7	53.7	53.1	4.1
Southern	72.3	71.8	74.0	72.3	85.7	84.9	85.3	40.1	46.8	95.9
Other	.1	0	0	.1	0	0	0	0	.1	0
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Central Corridor										
SP-UP	3.0	7.9	5.0	4.1	2.6	1.7	2.2	16.8	8.0	2.8
SP-DRGW	3.8	1.8	0	3.2	2.0	2.6	2.2	6.6	3.7	0
WP-UP	.1	.7	0	.2	1.3	0	.7	.5	.4	0
WP-DRGW	.5	1.4	0	.7	.7	0	.4	0	1.4	2.8
Other *	92.6	88.2	95.0	91.8	93.5	95.7	94.4	76.1	86.5	94.4
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

* Predominatly reflects Southern UP-UP overland route except in Mid Central.

Totals may not equal 100 due to rounding.

[521] Table 8 reflects all originations in northern California, to all destinations and via all routes. This includes originations that move over the central corridor; originations that move over the southern corridor to points also served by central corridor routes, or to markets not served by the central corridor; originations that terminate in the Pacific Northwest; and northern California originations that terminate locally. Table 8 incorporates the geographic market so as to completely address area and route competition.[56]

TABLE 8

UP-WP-MP Share of Northern California Originations
1979

Route		Percentage Share of Tonnage
UP		9.4
from WP in Salt Lake City	4.6	
from SP in Ogden	12.7	
to UP in Northwest	1.4	
to UP in California	0.5	
other	0.3	
WP		9.4
to DRGW in Salt Lake City	4.2	
to BN in California	2.6	
other	2.5	
MP		3.4
from DRGW in Pueblo	1.7	
from SP in Texas	0.7	
from ATSF in Texas	1.0	
Total UP-WP-MP		32.2

Source: 1979 One Percent Waybill Sample.

Notes: (1) The WP share excludes all traffic handled by the UP. Thus, the WP-DRGW entry excludes WP-DRGW-UP movements. Similarly, the WP-BN-UP movements are excluded from the WP-BN entry.

(2) The MP share excludes all traffic handled either by the UP or WP. Thus, it excludes such movements as WP-DRGW-MP, WP-SP-MP, and WP-ATSF-MP.

(3) Detail may not add to total due to rounding.

[56] The subject of source competition is dealt with specifically *infra*.

Even in such a broadly defined geographic market, the proposed consolidation would significantly enhance UP's market power. In 1979 UP participated in 19.4 percent of all northern California originations. Receipts in Utah accounted for 17.3 percent, receipts in the Pacific Northwest for 1.4 percent, and receipts elsewhere for the remaining 0.7 percent. Adding WP to the UP system would raise the UP's participation in this market by 9.4 percentage points, while consolidation with the MP [522] would raise its share by 3.4 percentage points. The combined UP-MP-WP participation would be 32.2 percent.

Table 9 indicates the effect of the proposed consolidations on northern California terminations, by all routes,

TABLE 9

UP-WP-MP Share of Northern California Terminations
1979

Route		Percentage Share of Tonnage
UP		21.4
to WP in Salt Lake City	4.3	
to SP in Odgen	13.4	
from UP in Northwest	2.5	
from UP in California	1.0	
other	0.3	
WP		7.5
from DRGW in Salt Lake City	3.2	
from BN in California	1.5	
other	2.8	
MP		3.4
to DRGW in Pueblo	1.5	
to SP in Texas	0.7	
to ATSF in Texas	1.2	
Total UP-WP-MP		32.3

Source: 1979 One Percent Waybill Sample.

Notes: (1) The WP share excludes all traffic handled by the UP. Thus, the DRGW-WP entry excludes UP-DRGW-WP movements. Similarly, UP-BN-WP movements are excluded from the BN-WP entry.

(2) The MP share excludes all traffic handled either by the UP or MP. Thus, it excludes such movements as MP-DRGW-WP, MP-SP-WP, and MP-ATSF-WP.

(3) Detail may not add to total due to rounding.

from all points of origin. Again, a geographic market has been defined that incorporates area and route competition. Again, the proposed consolidation would have a significant effect on UP's market power, raising UP's participation share from 21.4 percent to 32.3 percent.

ATSF also analyzed the transcontinental competitive effect in terms of available independent routings. See Appendix E-2. This technique does not reflect the potential competitive impacts of the proposed transaction as well as the participation share data presented above. The routings analysis proffered by Santa Fe does not take into account the presence of only two carriers crossing the Continental Divide (UP and DRGW) in the central corridor, the presence of only three major railroads serving northern California, or the presence of only two transcontinental rail carriers in the southern corridor. Each of these competitive bottlenecks limits the [523] utility of describing northern California transcontinental rail competition in terms of the number of independent routings. Santa Fe's methodology ascribes equal rank to each route without regard for the amount of traffic actually or potentially moving over each route. Additionally, reliance on the number of routings, defined in terms of a number of carriers participating in a route, implies that a market would be more competitive solely if greater numbers of carriers participated in routes serving it. Our description of single system service benefits indicates that the converse is often true. *See Norfolk Southern*, 366 I.C.C. at 227-28.

Finally, a parallel effect of the proposed consolidation appears in the analysis of all transcontinental routes which did not enter into our consideration of the central corridor. The MP line across Texas competes for transcontinental traffic through the southern corridor, interchanging with SP at El Paso and ATSF at Sweetwater. This line parallels the MP line to Pueblo and the UP lines from Kansas City to Denver and to Cheyenne. To

the extent the southern corridor is a close substitute for the central corridor routes, elimination of MP's incentive to compete for transcontinental traffic over this line would be a horizontal effect of the consolidations.[57] However, any horizontal effect arising from the potential elimination of the MP El Paso line as an active competitor for transcontinental traffic is substantially mitigated by the fact that the El Paso line must interchange with either the SP or Santa Fe to handle transcontinental traffic. Both of these systems provide independent singe line southern corridor routings extending well into MP territory to the east.

In order to estimate the effect of alternate southern corridor routings on the parallel effect arising from the applicants' lines east of Denver, described in Tables 3 and 4, *supra*, we have applied expansion factors to approximate southern corridor competitive ability. Table 1, *supra*, indicates the shares of northern California rail traffic moved over the southern and central corridors. The southern corridor is least effective in competing for traffic to the Mid Central region, with a market share of 20.3 percent. The southern corridor carries 23.0 percent of traffic between northern California and the north central region and 37.6 percent of traffic to and from the Eastern region. The southern corridor is a more effective competitor to and from the Southern and South Central regions, carrying 64.8 percent and 85.8 percent respectively.

Using these corridor shares to expand the market shares in Tables 3 anud 4[58] reveals that, while the com-

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[57] If the MP southern corridor and central corridor routes are close substitutes, the competitive effect in the southern corridor would be much the same as that discussed *supra* related to the MP line to Pueblo.

[58] The shares set forth in Tables 3 and 4 are for all traffic moving over the central corridor east of Denver, while the corridor shares in Tabie 1 reflects northern California traffic. It is our opinion that the shares for all traffic may be applied in turn to northern California traffic.

petitive effect is reduced in some [524] markets, notably to and from the South Central region, a substantial increase in concentration continues to exist in other markets. For example, the southern corridor handles 37.6 percent of traffic between northern California and the Eastern region ("All Eastern"). Expanding UP's market share, 75.7 percent, in Table 3 to reflect this broader market reduces the UP share of westbound traffic to 47.0 percent.[59] UP's post-consolidation share of all transcontinental traffic to northern California from the East would increase by 5.8 percentage points to 52.8 percent. Eastbound in the market northern California to the East the UP share of all traffic would increase from 48.4 percent to 53.1 percent.

The effects of the consolidation on UP's market share are, as expected, smaller in this broad geographic market than in the central corridor.[60] Nonetheless the predicted shares of the merging firms in some markets are still of such magnitude that the proposed consolidation would probably be held by a court to be a violation of Clayton section 7.[61]

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[59] The calculation is: (1-.376-.003) x (.757) = .470, or 47.0 percent.

[60] Again, the parties each estimate similar competitive effects. See Appendix E-2.

[61] The Supreme Court struck down the following horizontal mergers: *Philadelphia National Bank*, 374 U.S. 321 (aggregate market share of acquiring and acquired firms: 30 percent); *Aluminum Co.* [Rome Cable], 377 U.S. 271 (1964) (aggregate market share: 29.1 percent); *United States* v. *Continental Can Co.*, 378 U.S. 441 (1964) (aggregate share: 25.0 percent); *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966) (aggregate share: 8.9 percent); *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966) (aggregate shares in three markets: 24.0 percent, 11.3 percent, and 4.5 percent); *United States* v. *Phillipsburg National Bank*, 399 U.S. 350 (1970) (aggregate share: 19.3 percent). *See* Areeda and Turner IV, *supra*, at 31.

Although the MP El Paso line parallels the central corridor lines, consolidation of the UP and MP may also create vertical effects at the El Paso and Sweetwater gateways if the MP can exercise market power to favor the consolidated system's long-haul route through the central corridor. We conclude that this result is unlikely.

The southern corridor routes are more competitive for southern California traffic, and a large share of traffic moving over the southern corridor originates or terminates in southern California. *See* Table 7, *supra.* It is unlikely that the consolidated system will be able to exercise sufficient market power to divert traffic moving between MP points in the South Central region (Texas, Louisiana, Arkansas and Oklahoma) from the direct southern corridor routing to the west to a route over MP north to Kansas City then northwest over UP through Wyoming and Utah, and finally southwest over UP to southern California. Half of the El Paso interchange and 40 percent of the Sweetwater interchange involve traffic moving between southern California and the South Central region.

For traffic moving to and from other regions SP's new Tucumcari routes to Kansas City and St. Louis will provide an improved alternative [525] to interchange with MP at El Paso. Santa Fe's single line service to and from Kansas City and Chicago for other connections provide alternatives to interchange with MP at Sweetwater.

The DOT "market power" study confirms the unlikelihood of substantial competitive impact related to the MP El Paso line.[62] DOT projects that the consolidated system will be able to divert at least 4,600 cars from SP at El Paso and 6,200 cars from ATSF at Sweetwater. These diversions represent but 12 percent of the El Paso inter-

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[62] The DOT study was discussed, *supra*, in the section relating to vertical effects in the central corridor.

change and 15 percent of the Sweetwater interchange.[63] Transcontinental traffic will clearly continue to move over the MP El Paso line after the consolidation. *See Traffic Protective Conditions*, 366 I.C.C. 112, 122-6 (1982).

We do not anticipate substantial effects arising from the consolidation on the operation of the MP El Paso line or on competition in the southern corridor. MP continues to have an incentive to route transcontinental traffic, especially southern California traffic, over its southern corridor line, and two major transcontinental carriers provide alternative southern corridor service.

(3) *Conclusion on transcontinental competitive effects*: Approval of the consolidation will result in an increase of UP's market share for transcontinental traffic moving through the central corridor east of Denver from approximately 75 percent to approximately 85 percent. Concentration of this magnitude represents a substantial lessening of competition in these markets and must be redressed if we are to approve the proposed transactions. The substantially increased central corridor market share reflects the loss of DRGW's largest eastern interchange, with MP at Pueblo, and a substantial lessening of competitive alternatives for transcontinental, central corridor traffic moving across the Great Plains.

For all transcontinental routes serving northern California UP's participation share will increase from approximately 19 percent to 32 percent.

For the reasons discussed *infra* regarding trackage rights conditions imposed favoring DRGW and SP, we conclude the anticompetitive results we have identified regarding transcontinental traffic can be successfully ameliorated.

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[63] As discussed above, the DOT study did not differentiate between diversions arising from applicant's improved service and those arising from their ability to favor their long-haul.

Midwest traffic: MP and UP operate parallel lines between various points in Kansas and Nebraska.[64] In this section, we will discuss the com- [526] petitive impact in the Kansas City—Omaha/Council Bluffs corridor, and on traffic in Kansas. The competitive effects on north/south traffic moving to or from Gulf points will be discussed in the section dealing with end-to-end effects.

(1) *Kansas City—Omaha/Council Bluffs Corridor*: MP and UP operate parallel routes between Kansas City and Omaha-Council Bluffs. The MP route generally follows the Missouri River through Atchison, KS with various branch lines including one serving Lincoln, NE. The UP route runs west from Omaha/Council Bluffs and then south through Lincoln to Topeka, KS[65] where it turns east to Kansas City.

Although the UP route between Omaha/Council Bluffs and Kansas City is approximately 60 percent more circuitous than the competing MP route, UP still maintains a significant share of the rail freight market in this corridor. In 1979, the three major carriers operating between Kansas City and Omaha/Council Bluffs held market shares of 42 percent (BN), 38 percent (MP), and 13 percent (UP). CNW also operates in this corridor.

The CNW pooling agreement, discussed *infra*, will result in CNW becoming a more effective competitor between Kansas City and Omaha/Council Bluffs. While CNW will be in a stronger competitive position through pooling its traffic over the MP line, the basis of a pooling

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[64] In related applications in Finance Docket No. 30,000 (Sub-Nos. 8, 9, and 10) UP and MP seek approval of pooling applications over these lines. These applications involve, respectively, pooling over MP's line between Council Bluffs and Kansas City (Sub-No. 8); and UP's line between Beloit, KS and Salina, KS (Sub-No. 9); and over the UP line between Lincoln and Kansas City (Sub-No. 10).

[65] MP serves Topeka over a branch line from its Kansas City to Pueblo mainline.

agreement is the existing competition between the pool carriers, 49 U.S.C. 11342. Even though the CNW will become stronger, the consolidation nonetheless will result in the elimination of one competitor in this corridor—a horizontal competitive effect of the proposed transaction. Coupled with a vertical effect at Kansas City discussed *infra*, the loss of competition in this corridor would constitute a substantial lessening of competition as a result of the proposed transaction.

(2) *Kansas*: MP and UP operate a number of generally east-west lines serving points in Kansas. While UP and MP each operate to and from numerous points in Kansas, along with other railroads whose lines are separated by relatively short distances, they are not significant competitors for Kansas traffic, principally grain, for two reasons.

First, there are few Kansas shippers served directly by both MP and UP. Of the 329 separate locations in Kansas at which rail traffic originates or terminates, only seven were served in 1979 by both UP and MP and at four of these locations at least two other railroads provided service.[66] The three Kansas points served exclusively by UP and MP accounted for but one percent of all Kansas rail traffic in 1979.

[527] The second reason UP and MP are not significant competitors at many points in Kansas is that UP and MP generally serve different destination markets, which themselves compete for grain movements. UP principally competes in Kansas with Santa Fe, SP and BN for grain movements to the West Coast, while MP principally com-

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[66] The seven locations where UP and MP generated traffic include Beloit, Frankfort, Kanapolis, Kansas City, McPherson, Salina and Topeka. Both ATSF and Rock Island (with SP now operating this line) also generated traffic at McPherson, Salina and Topeka, while numerous carriers serve Kansas City.

petes in Kansas with Santa Fe, BN and MKT for movements to the Gulf.

MP and UP operate parallel routes between Beloit, KS and Kansas City and between Salina, KS and Kansas City. Santa Fe provides direct competing service in the Salina-Kansas City corridor.

Traffic in the Beloit-Kansas City corridor is primarily grain that moves by truck to Beloit for forwarding to Kansas City. There are several alternative truck-rail options for these movements.[67] For example, Santa Fe has a direct line to Kansas City from Concordia, KS, 20 miles east of Beloit. Santa Fe also operates between Kansas City and Minneapolis, KS, 25 miles south of Beloit. Service is also available over other proximate points on BN and on former Rock Island lines still in operation.

The application is supported by numerous Kansas shippers and by the State of Kansas.[68] No significant competitive issue has been raised relative to the Kansas market. In fact, the principal effect of the consolidation in this market will not be to lessen competition, but to expand options for both MP and UP grain shippers by giving them single system access to both Gulf and Pacific ports. See *Norfolk Southern*, 366 I.C.C. at 195-96, 278-80.

West Coast: SP provides single line, north-south rail service from the Pacific Northwest to southern California along the West Coast. SP direct and BN-SP routings hold the dominant share of traffic in this market. WP participates in this market through interline service over the Bieber route, BN-WP-ATSF. UP also operates between the Pacific Northwest and southern California over

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[67] Various truck-rail options are generally available for all Kansas points including possible direct truck service to Kansas City.

[68] While not a formal party to this proceeding the State of Kansas was allowed to appear at oral argument and state its position.

its inland route through Utah. The consolidation of WP and UP will give rise to a parallel effect in this market. However, the UP route is approximately 700 miles more circuitous than the competing routes near the coast. The UP route presently handles some traffic from the Pacific Northwest to southern California due to its service area in the Northwest and single-line service. It is unlikely, however, that UP will be able to enhance significantly its share of this traffic due to the circuity of its route. For this reason, we anticipate that UP will have an economic incentive for continued participation in movements over WP's Bieber route.

[528] Nonetheless, UP control of WP provides the consolidated system the opportunity to affect service over the competing Bieber route. This is significant because BN is now required to route traffic over Bieber by conditions imposed in the *Northern Lines* proceeding. UP's control of WP may be used to adversely affect service on certain BN traffic over the Bieber route and thereby blunt competitive response by BN. In order to ensure that appropriate responses to the new system's service are available, without restriction, to the other carriers competing for traffic in this market, we will remove the so-called Bieber conditions as discussed below. This will allow economic conditions and competition to dictate appropriate routes.

End-to-End Effects: As opposed to the parallel aspects of a consolidation, the end-to-end effects generally do not result in a reduction in the number of rail competitors serving transportation markets. However, there may be an affect on source competition arising from end-to-end transactions. End-to-end transactions also may allow the system to divert traffic from remaining competitors and hence foreclose their ability to compete in the marketplace. *See Brown Shoe*, and *Norfolk Southern*, 366 I.C.C. at 216. We will address first the expected impact on source competition and then the potential competitive impacts arising from traffic diversions.

Source competition: Although the effects of lessened source competition appear in markets for the delivery of a product to a destination and are, therefore, fundamentally horizontal effects, any reduction in such competition will occur because of the end-to-end aspects of the merger.[69] DOJ conducted an analysis of potential reductions in source competition and concluded that the consolidation is unlikely to have substantial anticompetitive effects in this area.

DOJ classified commodities (at the 4-digit STCC level) moving to individual counties by UP, MP and WP participation based on the one percent waybill sample. Using the methods described in Appendix E-2, DOJ identified markets where applicants will handle a significant and increased share of total deliveries. Based on this analysis, 267 commodities delivered to 134 counties were identified with approximately $600 million in 1979 rail revenues. However, based on 1977 Census of Transportation data, DOJ concluded that truck competition is likely to be effective in markets with revenue totalling $350 million. The remaining $250 million reflects $100 million in rail revenues for commodities (primarily bulk commodities) not included in the screening for truck com- [529] petition,[70] and $150 million generally derived from traffic in motor vehicles and equipment.

DOJ concluded, and we concur, that these estimates overstate the likely impact of the consolidation because they do not reflect the impact of product competition at the various destinations. To the extent that other products reaching the destinations are reasonably close substitutes for any product over which the consolidated system may have influence, the availability of those sub-

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[69] The consolidated carrier extends its influence over various sources of supply by the end-to-end extension of its lines to new markets.

[70] These commodities were not covered by The Census of Transportation, DOJ's screening device.

stitutes constrains the consolidated system because consumers at the destination will respond to increased delivered prices caused by reduced source competition by switching to other products.

Because of these mitigating effects, we conclude that the consolidations will not substantially lessen source competition.[71]

Traffic diversion: The loss of traffic to another carrier can indicate either the presence of competition or its absence, and if diversions are attributable to greater efficiency (in the form of better service or lower rates) they cannot be said to be anticompetitive.

Nevertheless, traffic diversions are not unrelated to potential competitive effects of rail consolidations. The consolidated carriers will have an incentive to favor their own long haul routes as long as that routing is not less profitable than available interline routings. If one of the end-to-end consolidation partners formerly interchanged traffic with both its consolidation partner and other carriers in providing joint line services over a particular gateway, the transaction may result in the foreclosure of the nonincluded carrier from competing in the markets it formerly served.

If such circumstances occur, the consolidated system may profit by limiting the "downstream" competition and routing traffic over its own lines from origin to destination. The DOT "market power" study, discussed *supra*, is an attempt to measure this effect.

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[71] SP argued that source competition will not adequately constrain the market power of the new system. Our examination of source competition here is only as to whether the consolidation will result in a substantial lessening of source competition. While source competition may mitigate other competitive effects, we have resolved other adverse competitive effects without reliance on source competition.

This vertical foreclosure effect will occur, if at all, at the gateways served commonly by the consolidating carriers. The major interchanges conducted by applicants in this proceeding are at Salt Lake City (UP-WP) and Kansas City (UP-MP). We have discussed the vertical foreclosure effects expected to arise at Salt Lake City (and Ogden) as part of our discussion of the parallel effects on central corridor transcontinental competition, *supra*. Here, we will address the vertical effects expected to arise at Kansas City.

[530] The concern with foreclosure at Kansas City focuses on north-south traffic moving in the corridor between Kansas City and the Gulf. UP presently operates as a neutral connection at Kansas City for traffic moving to or from points north and west of Kansas City. As indicated by Table 10 UP is involved in a substantial volume of traffic in this corridor.[72]

TABLE 10

Carloads of UP-Originated Traffic Destined to Texas Points Interchanged at Kansas City by Connecting Carrier—1979

MKT	22,083
MP	10,343
KCS	5,517
ATSF	5,301
SLSF (BN)	2,865
Total	46,109

UP's primary connections for traffic destined to points in Texas are MP and MKT. Despite the difference in size between these two connections,[73] the UP hands off twice as much Texas traffic to MKT as to MP.[74] The MP and

[72] As discussed *infra* with regard to MKT trackage rights much of this traffic is grain.

[73] MP has 3,352 route miles in Texas, MKT has 1,916.

[74] We note that MP has its own gathering lines north and west of Kansas City and competes with UP for some of this traffic. See the discussion of parallel effects, *supra*.

MKT are each effective and efficient routes south of Kansas City.

After the consolidation UP will have an incentive to favor the MP line in order to maximize its profit from movements south of Kansas City. Because MKT handles the largest amount of UP traffic moving to Texas via Kansas City it will be the competitor south of Kansas City most directly affected by the shift of UP traffic to the MP. MKT handles about four times as much UP-Texas traffic as its closest competitor (except MP).

The DOT "market power" study indicates that the MKT will lose 22,600 carloads of traffic presently interchanged with UP at Kansas City or 73 percent of MKT's interchange with UP.[75] In addition the leverage ratio calculated for the MKT at Kansas City is 6.49. This figure is the highest leverage calculated by DOT and is almost twice as large as the next highest figure. The ratio indicates that MKT receives 6.49 cars from UP at Kansas City for every car it forwards to UP at Kansas City suggest- [531] ing that MKT will have little ability to respond competitively to the UP traffic shifts.

In combination with the elimination of UP-MP parallel competition between Kansas City and Omaha/Council Bluffs this vertical foreclosure of MKT at Kansas City represents a substantial lessening of competition for traffic, especially grain, moving from the area between Omaha/Council Bluffs and Kansas City to the Gulf. Service from Omaha to the Gulf is provided by MP direct, BN direct and UP with interchange at Kansas City, primarily with MKT. The consolidation of UP and MP directly eliminates competition between carriers with 13 percent and 38 percent respectively of the Omaha-Kansas City market (second and third behind BN with 42 percent of this market). The potential diversion of over 73

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[75] These figures are based on all UP-MKT interchange at Kansas City, as opposed to Texas traffic reflected in Table 10.

percent of the UP-MKT interchange at Kansas City substantially limits MKT as a competitive factor south of Kansas City. After the consolidation the Omaha-Gulf market, which now has three competitive routes, will only have two (UP and BN).

We conclude that this combination of effects results in a substantial lessening of competition which must be ameliorated as a condition to approval of the consolidation.

Conglomerate effects: A "conglomerate merger" of corporations is one in which the consolidating firms are neither competititors nor potential or actual customers or suppliers of each other. *United States* v. *General Dynamics Corp.*, 258 F. Supp. 36 (S.D.N.Y., 1966). A conglomerate merger does not result in elimination of a competitor, but merely substitutes the competition of the acquiring company for that of the acquired company in the markets served by the acquired company. Such a merger does not in itself result in any increase in market concentration. *United States* v. *Continental Can Co.*, 217 F. Supp. 761, 786 (S.D. N.Y. 1963) *rev'd on other grds.* 378 U.S. 441 (1964). Conglomerate mergers are generally innocuous from an antitrust standpoint, *United States* v. *General Dynamics*, *supra*, but they are within the reach, and are tested by the same standards, of Clayton section 7. *F.T.C.* v. *Proctor & Gamble Co.*, 386 U.S. 568 (1967).

Various parties in this proceeding have urged us to consider what are, in effect, conglomerate aspects of the proposed transactions. It is argued that the sheer size of the consolidated carrier will result in anticompetitive effects. We disagree.

While the UP system will provide extensive single system service throughout the West, its competitors also serve extensive territories and will be able to undertake serious competitive responses to UP's initiatives.

[532] If, after consolidation, UP participates in actions which are discriminatory or in restraint of trade various remedies are available to the carriers or shippers which may be affected by those actions under either the antitrust laws or the Interstate Commerce Act. Both carriers and shippers which may be affected are clearly capable of availing themselves of these remedies if necessary. Carriers competing with UP are themselves large, sophisticated organizations. Tables 11 through 13 indicate that a significant percentage of shippers dealing with the consolidating carriers are also large organizations fully capable of asserting their legal rights. Under these circumstances we find it unlikely that the size of the consolidated carrier alone will result in any substantial lessen-

TABLE 11

Union Pacific Railroad Shippers Statistics [76]
1979

	Carloads	Percent
Top 10 Carload shippers	496,072	27.1
Top 50 Carload shippers	1,233,465	67.4
Top 100 Carload shippers	1,562,419	85.4
Total carloads	1,829,151	100.0

TABLE 12

Missouri Pacific Railroad Shipper Statistics [76]
1979

	Car, Trailers Containers	Percent
Top 10 Carload shippers	568,999	27.9
Top 50 Carload shippers	1,312,444	64.3
Top 100 Carload shippers	1,716,473	84.1
Total carloads	2,041,426	100.0

[76] Shipper statistics in Tables 11 and 12 are predicated upon participation, and since each waybill has both a consignor and consignee, some duplicate counting can occur (*i.e.*, a car from a coal mine to a utility would be counted twice while a car from Firm A to Firm A would only be counted once).

ing of competition. The fact that large shippers make up such a substantial proportion of applicants' market also will reduce the likelihood of anticompetitive effects in each of the general areas we have discussed.

[533]

TABLE 13

Western Pacific Railroad Shipper Statistics [77]
1979

	Car Trailers Containers	Percent
Top 10 Carload shippers	94,146	37.9
Top 50 Carload shippers	280,588	72.6
Top 100 Carload shippers	222,906	89.6
Total carloads	248,717	100.0

Conclusion

The proposed transactions will have a significant adverse competitive effect (1) on rail transportation of transcontinental traffic, especially in the central corridor; and (2) on rail transportation in the Midwest, especially traffic moving through the corridor between Omaha/Council Bluffs and destined to the Gulf. These effects must be ameliorated before we can approve the proposed transactions.

The favoring of the WP Bieber route by conditions imposed in the *Northern Lines* case creates another potentially anticompetitive effect of the UP-WP consolidation in that UP may be in a position to affect the competitive responses available to BN for traffic moving between points along the West Coast. Modification of the Bieber conditions will free BN to select the most appropriate route in competing with UP in this corridor.

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[77] Shipper statistics are based only upon consignor information and duplicate car counts do not occur.

We do not find significant adverse competitive effects in any other area which arise from the consolidations. Specifically we find no substantial effect on source competition or on competition for the transportation of coal, as discussed *infra*.

COAL TRANSPORTATION

UP and MP each handle substantial volumes of coal traffic. In addition, rail is at present the only practical mode for most long-haul coal transportation. Some water carrier competition exists. However, because water carriers rarely serve coal origins, coal movements using water carriers usually rely on rail carriers to serve the origin point. Slurry pipelines may offer competition in the future. The pipelines proposed to date, however, all face various obstacles and, therefore, are still somewhat [534] speculative. "Coal-by-wire" (mine mouth generating facilities with transmission lines to the utility's service area) is becoming a viable option with respect to Texas lignites for Texas utilities. Because of various problems with economical long-distance electricity transmission, "coal-by-wire" does not yet appear to be a viable option to rail transportation for western coal moving to the Midwest and South. Given the significance of coal shipments to rail carriers, and the corresponding significance of rail transportation to coal shippers and users, we will give special consideration to the impact of the proposed transactions on coal transportation competition.

Coal regions served. At present, UP has direct access to the Hams Fork and Green River coal regions of southern and western Wyoming. It also has access to coal regions in Colorado and Utah. Further, when CNW begins the operations we approved in the *Connector Line* case, UP will have access to coal in northern Wyoming's Powder River Basin (PRB) south of Coal Creek Junc-

tion (the northern end of the joint line, see Appendix K).[78]

Ninety-two percent of the coal originating on UP lines comes from Wyoming and 5 percent comes from Colorado. The Hams Fork and Green River Regions contain deposits of low-sulfur bituminous and sub-bituminous coal with a heat content of from 8,000 to 12,000 BTUs per pound. The regions contain relatively thin, steeply sloping coal seams. The high cost of mining in these regions put these coals at a competitive disadvantage with respect to PRB coals.

The PRB is by far the most important coal-producing region in the Northern Plains States of Montana, Wyoming, North Dakota and South Dakota. This region has very large deposits of very low-sulfur, sub-bituminous coal. These coals have a heat content of about 8,000 BTUs per pound. The PRB contains about 75 percent of the total coal reserves of the Northern Plains. Because these deposits are in very thick seams, the PRB has the lowest mining costs in the United States. In 1980, the PRB produced about 40 percent of all coal in the West. By 1995, the PRB may be producing as much as 60 percent of all western coal.

MP originates substantial coal traffic in Illinois. Ninety-seven percent of MP's coal originations are from Illinois mines. The cost and the heating value characteristics of this coal limit its marketing area. Most of the coal traffic originating on MP lines, therefore, moves relatively short distances and terminates in the Midwest.

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[78] Although CNW has not yet begun operations over the joint line and the connector line, we will consider the impact of the consolidations on coal transportation assuming that CNW operations do begin in accordance with our decision in the *Connector Line* case. In that decision we noted that this proceeding presents the proper forum for considering the cumulative impacts of the joint line/connector line operations and the proposed consolidations. *Connector Line*, 363 I.C.C. at 932.

MP also handles a substantial [535] volume of western coal, mostly from the PRB on an interline basis with BN, but with some interline movements with DRGW.

WP has no direct access to any coal producers and, thus, originates no coal traffic. Further, in 1979 WP interchanged less than 50,000 tons of coal with UP.

Competition between applicants. No significant competition exists between the applicants for the transportation of coal. Therefore, consolidation cannot adversely affect coal traffic competition by eliminating competition between applicants. UP and MP serve different coal-producing regions and WP originates no coal. The applicants do not handle coal traffic to any commonly served utility plants or coal transshipping facilities. Thus, consolidation would not adversely affect any existing source competition and, because of the limited number of common points, would not have a significant impact on potential source competition.

Applicants interchange very little coal traffic. The only significant coal traffic interchanged between applicants consists of UP/MP interline traffic to the Union Electric Company's West Labadie, MO plant. Union Electric supports the consolidation.

Because there is no significant actual or potential competition between applicants for coal traffic, we conclude that the proposed consolidations would not have an adverse impact on coal traffic competition between the applicants.

Competition with other carriers. The proposed consolidations will not unduly restrict competition between applicants and other carriers transporting coal.

Markets for the transportation of steam coal[79] have many unique characteristics. These markets, therefore,

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[79] Steam coal is used for power generation. The record does not show that the proposed transactions would have any significant impact on the transportation of metallurgical coals, the other major type of industrial coal. Our discussion, therefore, will be limited to steam coal.

often differ significantly from markets for other types of rail transportation services. Most steam coal moves either to utility plants or to export facilities. We will first consider the competitive impacts of the proposed consolidations on the transportation of coal to utility power plants.

Two very different types of competition take place with respect to the transportation of steam coal to utilities. Before a new utility plant has been sited, designed, and constructed, "ex ante" competition takes place between various fuels, fuel sources, transportation modes, and carriers. After a plant has been constructed, very limited "ex post" competition takes place between fuel sources and carriers.

The scope of the relevant market for steam coal transportation depends upon the type of competition being considered. With respect to [536] ex post competition, relatively narrow transportation markets are involved. The competitive market, or submarket, is utility site-specific at the destination and is source-specific at the origin. Depending upon the circumstances of a particular utility, the relevant origin may be a particular coal producing region or even a single mine. We have recognized the relatively narrow scope of ex post competition in *CSX* and in various coal rate case proceedings. Ex ante competition, on the other hand, involves far broader markets for coal transportation. In selecting a fuel source for a new plant, a utility can choose among various coal-producing regions. Because boiler design is not fixed until after a fuel source has been selected, a utility is not tied to the coal of a particular region at the ex ante stage. Further, before a site for a new plant has been selected, a utility cannot be captive to a single delivering railroad so long as it has siting options available on the lines of more than one railroad (or it has access to water transportation). Therefore, the relatively narrow markets relevant to ex post competition

are not comparable to the broader markets relevant to ex ante competition. In analyzing competition for steam coal traffic, the significantly different markets applicable to ex ante and ex post competition, respectively, must be kept clearly in mind.

(1) *Characteristics of ex ante competition.* Ex ante competition is more effective, and has become much more significant, than ex post competition. When planning a new plant, a utility must select the type of fuel, fuel source, transportation mode, and plant site. In selecting fuel type, fuel source, and transportation mode, a utility seeks to achieve the lowest total cost for generating power. Coal is now the heavily favored choice for type of fuel because of economic, environmental, and political considerations that make it preferrable to oil, natural gas, and nuclear power. At the ex ante stage, different coal sources can compete because the boiler has not yet been designed to burn coal with specific characteristics. Therefore, a utility is in a much stronger bargaining position at the ex ante stage than it is at the ex post stage.

In siting a new plant, a utility must consider topography and foundation conditions, adequacy of water supply, proximity to load centers, transportation availability, and environmental factors. These factors, along with fuel type, fuel source, transportation mode, and available carrier or carriers, must all be considered together in the utility's decisional matrix in order to select the optimum combination for generating power at the lowest cost.

Even after a utility decides on coal as the type of fuel for a new plant (as is usually the case because of coal's advantages), the utility has the benefit of ex ante source competition and rail intramodal transportation competition. If the utility has water carrier-served sites avail-

able, it will [537] also benefit from intermodal competition. Because of source competition and the availability of different potential plant sites, the utility most likely will not be captive to a single rail carrier at origin or destination. Therefore, a railroad must offer competitive rates at the ex ante stage in order to induce the utility to locate on its lines or to buy coal from fields it serves.

Utilities usually guaranty [sic] supplies of suitable coals, once a source has been selected, by entering into long-term contracts with suppliers. Further, utilities are now frequently entering into long-term coal transportation contracts. The legality of contract rail service has only recently been established, and utilities previously had to rely on railroad estimates of coal rates for future movements to proposed plant sites. These estimates were not binding and after plants were built the utilities had to pay whatever tariff rate the railroad established, subject to maximum rate regulation, unless feasible alternative transportation were available. Our policy statement on contract rail service and the Staggers Act, however, have clarified the legality of railroad service contracts. Because of ex ante source competition and the availability of optional plant sites, utilities have leverage in negotiating contracts with railroads. Decision service contract provides a utility with a mechanism for preserving the benefits of ex ante competition after it has selected a plant site and coal source. Because utilities are more frequently entering into long-term contracts for the purchases of coal and of transportation services, ex post competition is becoming relatively insignificant with respect to new utility plants. These plants benefit from ex ante competition and then, through long-term contracts, the supply of coal and the supply of coal transportation are set. Competition effectively ends at that point in many cases.

(2) *Characteristics of ex post competition.* Existing utility plants have available only ex post competition.

The effectiveness of ex post competition varies depending upon the situation of a specific utility. Ex post competition, however, is usually rather limited. Existing plants are often located on only one carrier's lines and are usually committed to using the coal of a particular region, or even of a particular mine.

At the ex post stage a utility probably will be captive to a railroad if the railroad has a monopoly over any segment of the service route, whether it be the origin, the destination, or a bridge segment. Unless a utility is able to exert leverage on a carrier with a monopoly segment, that carrier will have no incentive to agree to a through rate that would be lower than the optimum profit-maximizing level (usually the maximum reasonable rate permitted by regulation). If two or more carriers on a service route for a utility plant have segment monopolies (for example, an origin monopoly and destination monopoly), then they will set the through rate as [538] high as possible and divide the profits in accordance with their relative bargaining power with each other. If only one carrier on the route has a segment monopoly, then that carrier will have an incentive, and will often have the ability, to keep all available monopoly profits to itself.

BN and OSC contend that a utility will receive the benefit of competition between carriers serving the origin point of a coal movement, even if only one carrier serves the destination, so long as the destination carrier is unaffiliated with, an [sic] thus neutral toward, the carriers serving the origin (neutrality theory). We conclude that the neutrality theory has not been shown to support BN's arguments with respect to the coal transportation markets involved in these proceedings.

A carrier with a destination monopoly will likely push the through rate as high as possible and keep the monopoly profits to itself by playing off competing connecting

carries against one another in setting divisions. That is, the through rate will be at the level maximizing net revenue for the traffic, subject to regulatory limits, and the destination carrier will establish favorable through service with the origin carrier willing to take the lowest division of the through rate for its segment of the movement. Although a destination carrier might not always be successful in executing this strategy, it will always have the incentive of profit-maximization to attempt to execute the strategy. Therefore, this rate strategy will be pursued and should succeed unless there are obstacles to its execution with respect to a specific movement.

BN and OSC assert that a neutral destination carrier usually will not be able to execute this "vertical price squeeze" and, therefore, has an incentive to merge with an origin carrier in order to drive the through rate to the optimum profit-maximizing level. We are not convinced either that a carrier with a destination monopoly for steam coal traffic will generally be unable to execute the described rate strategy or, on the other hand, that a neutral destination carrier that is unable to execute the strategy would be significantly more capable of raising the through rate to the level that maximizes its profits after affiliation with an origin carrier.

At the ex post stage, effective competition requires that competing origin lines have independent access to a power plant, either directly or through interlining. However, if the origin carriers must all interline with the same connecting carrier to reach the destination, then independent access is lacking, even if the destination carrier is not affiliated with an origin carrier. An origin carrier must have access to the destination over a route independent of the other origin carrier's route, not merely access by interlining with a carrier independent of the other origin carrier. This is the meaning of "independent access" needed for effective competition, as

discussed in *CSX*, 363 I.C.C. at 571, 572. Independent access is [539] not the same thing as access over a single neutral destination carrier. Contrary to BN's assertions, our conclusion in *CSX* that effective competition requires independent access to a power plant by competing origin carriers does not support the neutrality theory. The neutrality theory, rather, is at odds with the rationale of *CSX*.

In *CSX* and in various coal rate cases, we have acknowledged the power of carriers with destination monopolies over coal rates. A carrier with a destination monopoly usually will have substantial market power over the rate regardless of whether it has suitable coal on its own lines or on the lines of an affiliate. Therefore, the market power faced by an existing utility is not created, or increased by, consolidation of a monopoly destination carrier with an origin carrier, *see CSX*, 363 I.C.C. at 573. We conclude that in the usual case a utility will not benefit from ex post origin competition if it must rely on only one destination carrier. In such circumstances, the benefits of competition at the destination would usually inure to the benefit of the destination carrier, unless the utility served has a sufficiently strong bargaining position to enable it to exert leverage over the destination carrier.

We do not reject the possibility that the benefits of origin competition might flow through to a utility despite a destination monopoly. We do not, however, presume that these benefits will, in fact, always flow through. Rather, we require a showing that a specific utility is able to obtain the benefits of origin competition even though it is served exclusively by one carrier at the destination. In making this showing, the most persuasive evidence is testimony on behalf of the utility explaining how it has effectively obtained, or could obtain, the benefits of origin competition at the plant with monopoly service.

At best, the neutrality theory shows that if an origin and a destination carrier merge, the merged carrier might have an incentive to squeeze out unaffiliated origin carriers from the service route and that the merged carrier will attempt to maximize its profits. The theory, however, does not convincingly demonstrate that such a merged carrier would be able to exercise increased market power to the detriment of utilities. We are not persuaded by BN's arguments that a neutral destination carrier generally will not be able to execute a vertical price squeeze. Further, BN has not shown that a destination carrier which is not able to execute a vertical price squeeze without an affiliated origin carrier will necessarily acquire that ability after an affiliation.

BN argues that lack of information regarding origin carriers' costs inhibits the destination carrier from being able to set the through rate at the level maximizing profits for the traffic. Even if we assume that carriers are substantially ignorant of each others costs, we are not convinced [540] that this would have an impact on coal rates. A lack of knowledge regarding costs may have some impact on the destination carrier's ability to obtain all of the profits above a minimum acceptable rate of return for itself, rather than to share them with an origin carrier. This issue, however, relates only to how profits would be allocated between the railroads in setting divisions. The lack of knowledge of costs would not affect a carrier's ability to set the through rate at the level maximizing profits.

OSC and DOT contend that origin competition lowers the destination carrier's costs for obtaining service over the origin segment and, thus, for traffic where origin competition exists the destination carrier will set a lower price for the through service. As a general economic principle, the lowering of a monopolist's costs will lower the profit maximizing rate. To the extent the profit

maximizing rate lies above the maximum reasonable rate this analysis may not apply for regulated steam coal traffic.

In any event, this principle does not support the DOT and OSC position. As a monopolist lowers its price, it will sell more goods but will receive lower revenues per unit sold. Its profit will be maximized at the point where marginal cost equals marginal revenue. A lowering of its costs, therefore, generally will permit a monopolist to increase net revenues by lowering its price and selling more goods. In applying this principle, DOT and OSC assert that, for a destination carrier with market power to set the through rate, the division paid to the origin carrier is an element of the destination carrier's costs. Therefore, as the origin segment cost goes down, the destination carrier will lower the through rate in order to increase net revenues. For example, assume carriers A and B serve an origin and connect with carrier C which serves a destination. Carrier A is more efficient than carrier B and will accept a lower division. C will prefer to interline with A and will maximize its net revenues at a lower through rate than it would by interlining with B. DOT and OSC assert that if C merges with B, it will prefer the B-C route and will raise its rates.

The DOT and OSC position is not persuasive. First of all, it is doubtful that the destination carrier with market power would treat the division paid to the origin carrier as an element of its cost in setting the through rate. The through rate will be set at the level maximizing profits on the basis of the costs associated with the entire movement, subject to regulatory limits. Costs are determined by the technology and operating efficiencies related to available routes and types of service. Divisions, on the other hand, are negotiated between the carriers and relate to the allocation of the profits realized from handling the traffic.

[541] OSC argues that a utility, by soliciting secret bids from railroads for service over each segment of the route, can obtain the benefits of origin competition even if there is a destination monopoly, so long as the destination carrier is neutral. Applicants, on the other hand, assert that this same technique can be used to obtain competitive benefits even if the destination carrier is not neutral. No generalizations can be made about the availability or effectiveness of this type of rate solicitation with respect to steam coal traffic. If a utility has the bargaining power to exercise this type of rate solicitation effectively with independent carriers, it might also have the power to exercise it after an affiliation of two carriers in the service route. However, unit train operations provide the most efficient method for moving steam coal. These operations require close cooperation between the involved carriers. In these circumstances, solicitation of independent bids for each segment of the service route might not be an effective method for obtaining the most favorable rate available to the utility. Therefore, we cannot assume that this type of solicitation will generally benefit utilities. Rather, we must look to the evidence to see whether specific utilities affected by a consolidation can effectively use this type of solicitation. As noted, no affected utility has offered testimony in opposition to the consolidation or in support of BN's coal conditions. The record contains no convincing evidence that any affected utility would lose the power it now has, if any to benefit from secret rate solicitations if the UP-MP consolidation is approved.

BN cites a study by R.D. Willig (BN-H-32) in support of its arguments that a neutral destination carrier will lack the power to execute a vertical price squeeze in various circumstances unless it consolidates with an origin carrier. BN refers to two restraints identified by Willig. These restraints are the existence of inflexible revenue divisions between companies with a verticle re-

lationship and regulatory restraints on rate of return. The first restraint is not applicable to steam coal traffic because coal rate divisions between carriers are not set by inflexible rules. The second restraint is not relevant because merger of an origin and a destination carrier would not affect the maximum rate level for a coal movement. Our policy regarding the maximum reasonable rate for a coal movement is based on computation of costs for the entire movement. We do not use maximum rate of return regulation of the type discussed by Willig. Therefore, a destination carrier with the power to set coal rates at the maximum regulated level before merger would not be able to increase the rates after merger. To the extent our maximum rate regulations inhibit monopoly pricing, merger has not been shown to be an effective method of raising rates. Further, Willig notes in his study that no data exist which show whether vertical integration has been on the whole anticompetitive and harmful to consumers.

[542] We note that Willig does not argue that vertical extension by a dominant firm is anticompetitive. He only asserts that in certain circumstances vertical extensions may be used to extend market dominance with anticompetitive purpose and effect. Vertical extensions may even be procompetitive and in the public interest. BN has not shown that vertical extension by MP will have any anticompetitive effects with respect to the coal receivers it serves exclusively. Further, Willig's primary concern is that vertical extensions may lead to inefficient resource allocations. It has not been shown, however, that a CNW-UP-MP route for PRB coal would be less efficient than a BN-MP route.

The neutrality theory fails to establish as a general proposition that utilities will necessarily benefit from origin competition if they are served exclusively by a neutral destination carrier. Therefore, in determining whether a consolidation of an origin carrier with a neu-

tral destination carrier will have an adverse impact on ex post competition at a particular plant, we must first examine whether the destination carrier has power to set the rate at the monopoly profit-maximizing level (to the extent permitted by regulation) without a merger. If so, a merger could not affect the rates charged the public. If not, we must proceed to examine the particular factors that prevent the exclusive destination carrier from exercising maximum market power and we must determine whether these factors would likewise impede the merged carrier in the exercise of market power.

Our discussion above indicates that where one carrier has exclusive access to a utility, there usually will be little or no effective ex post competition. Therefore, we cannot find that a merger would have a detrimental impact on ex post competition to an exclusively served utility plant unless convincing evidence is presented showing factors enabling that particular plant to obtain the benefits of origin competition despite the destination monopoly. Such evidence has not been presented in this case.

(3) *Application of these analyses to competition for PRB coal.* We will next apply these analytical principles to BN's claim that the consolidation of UP and MP would reduce competition for PRB coal because of the cumulative impact of the proposed consolidations and the operations by CNW in the PRB approved in the *Connector Line* case. BN asserts that if CNW begins operations in the PRB and if the UP-MP consolidiation is approved and consummated, then de facto single system operations will be conducted by CNW-UP-MP hauling PRB coal to the midwestern and South Central States. BN argues that such operations would substantially lessen the competitive benefits that otherwise would be derived from CNW access to the PRB. While we agree that CNW's operations in the [543] PRB will be closely tied to UP and that, if the consolidations are achieved, CNW-UP-

MP may offer the equivalent of single-system service, such operations would not have a detrimental impact on the competition created by CNW's entry into the PRB.

As discussed, we do not find the neutrality theory persuasive. Loss of MP neutrality with respect to PRB coal will not lessen ex post competition with respect to utilities located on MP lines and burning PRB coal. None of these utilities has submitted a verified statement supporting BN's position or indicating how it might be able to obtain lower rates for movements of PRB coal if MP remains neutral with respect to BN-and CNW-originated coal than it would if MP and UP consolidate. Further, BN has not submitted persuasive evidence regarding the particular circumstances relating to ratemaking and service available to these plants. Therefore, the record does not show that these power plants would be able to benefit from CNW-BN competition in the PRB despite the MP destination monopoly. The lack of testimony from the five affected shippers seriously weakens BN's generalized economic arguments.[80] The record does not show that MP, as a result of the consolidation, would acquire greater market power than it now has as the exclusive destination carrier. Therefore, we cannot conclude that the proposed transactions, considered in conjunction with CNW operations over the joint line and connector line, would have a significant adverse impact on ex post competition.

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[80] We cannot conclude, as BN has suggested, that the reason the utilities have failed to support BN is that they fear offending MP. This suggestion is speculation without support on the record. Two Oklahoma utilities did file comments tentatively supporting BN, but did not submit evidence supporting BN. The comments stated that the utilities' reluctance to support BN was based on their concern that we might no longer consider the involved traffic to be subject to market dominance. The utilities, therefore, apparently believe that maximum rate regulation is more effective in restraining inequitable pricing than duopolistic competition would be.

Several factors exist which minimize the merged system's ability to foreclose BN. We agree with applicants that BN's advantage as an incumbent carrier will be significant. BN has had years to perfect its unit train operations in this area. Utilities are generally reluctant to switch routings of coal subject to long-term supply contracts which moves under unit train volume rates. Further, as relatively large shippers, the utilities are in a position to resist MP leverage to shift routings. Also, inasmuch as CNW service is not yet available from the PRB, BN will have opportunities to pursue negotiation of long-term transportation contracts. After CNW begins service, BN will retain competitive advantages by virtue of its access to mines throughout the entire PRB.

We further conclude that the proposed consolidations will not adversely impact ex ante competiton. MP faces competition throughout its serv- [544] ice area. Therefore, effective ex ante competition between railroads in the midwestern and South Central States will continue to exist after consolidation. BN asserts that MP serves a greater number of suitable areas for siting new utilities in Texas, Oklahoma, Arkansas, and Louisiana than does any other single carrier. MP, however, faces competition within its service area from SP, Santa Fe, KCS, MKT, and BN itself, and each of these carriers has access to some suitable power plant sites. Therefore, BN will be able to compete ex ante with CNW-UP-MP service for coal transportation to future power plants.

BN argues that unless the proposed consolidations are disapproved, or are approved subject to its proposed conditions, then BN will not be able to compete with CNW-UP for traffic to power plants served exclusively by MP. BN asserts that this would cause coal traffic now handled by BN to be diverted to CNW-UP and would disadvantage coal mines north of Coal Creek Junction in competing with mines in the southern PRB. We do not find these arguments persuasive. Although BN may lose some,

or even all, of the traffic it now handles in joint-line service with MP, this is not a public interest concern unless the traffic diversion would have a detrimental impact on the users of the transportation services (the mines and utilities) or would threaten essential services. As we noted in our discussion of the neutrality theory, vertical integration has not been shown to have a significant impact on ex post competition at MP-exclusive utility plants. In our analysis of BN's proposed conditions, we conclude that the potential diversions of coal traffic from BN do not threaten any essential transportation services. Further, coal mines north of Coal Creek Junction do not face any serious harm to their competitive positions. The PRB will remain the most important source of western coal for the foreseeable future. There may be some lessening of the ability of these mines to compete ex post for coal sales to utilities served exclusively by MP. However, they will still be able to sell coal to utilities served by SP, Santa Fe, KCS, MKT, and by BN directly. Further, because of the broader market scope of ex ante competition, they will be able to continue to compete effectively with southern PRB mines at the ex ante stage for coal sales to new power plants throughout the MP service territory.

Our conclusions with respect to the effects of the proposed consolidations, in conjunction with CNW operations in the PRB, are bolstered because no utility or public body in Texas, Oklahoma, Arkansas, or Louisiana has offered testimony in support of BN's position.[81] Further, the [545] State of Texas, where most new utility plants

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[81] Public Service Company of Oklahoma and Oklahoma Gas and Electric Company submitted joint comments on March 3, 1981, expressing "cautious support" at that time for BN's trackage rights applications to serve their respective plants at Oologah and Fort Gibson, OK. While neither of these companies has formally withdrawn these comments, neither have they submitted testimony in support of BN.

in the southwestern States served by MP will be located, does not oppose the UP-MP consolidation and contends that the consolidation will have a beneficial impact on coal transportation.

Denver & Rio Grande Western coal traffic. Although our discussion has focused primarily on competition between the proposed system and BN for steam coal traffic, DRGW also handles a significant volume of this traffic in Utah and Colorado. In 1979, DRGW carried over 19 million tons of coal, accounting for the largest share of its traffic originations. In that year, 51.1 percent of these carloads terminated locally on the DRGW. MP was Rio Grande's most important interchange carrier on coal traffic, receiving 17.8 percent of DRGW's coal carloads. UP received 7.3 percent of these carloads.

DRGW is concerned primarily about possible vertical foreclosure at Pueblo where it connects with MP. Coal is significant to DRGW because it comprises such a large part of its total traffic base. DRGW has not concentrated on discussing particular coal movements to specific plants or utilities. Rather, it has addressed coal traffic as part of its total traffic in the transcontinental central corridor facing possible vertical foreclosure at Pueblo. Further, DRGW has special concerns regarding vertical foreclosure of coal because UP handles coal that is competitive with DRGW-originated coal. DRGW's concerns have been addressed adequately in our discussion of competition in the central corridor. Further discussion with respect to DRGW's coal traffic in that corridor is not necessary.

Transportation of export coal. The proposed consolidations will not have a significant impact on the transportation of export coal. At present, little export coal moves through northern California ports. Two ports served by WP (Stockton and Sacramento), have plans to develop coal export facilities. Both ports have competitive rail service and both support the UP-WP consolidation. Fur-

ther, the Gulf Coast ports served by MP have competitive rail service and the record does not show that coal traffic to any of those ports would suffer serious anticompetitive impacts as a result of the UP-MP consolidation.

Conclusions. The proposed consolidations will not have any significant adverse impacts on any pertinent market or submarket for coal transportation. We have considered the cumulative impacts of the proposed transactions and of CNW operations in the PRB over the joint line and connector line. We conclude that UP-MP operations with CNW will not have a significant adverse impact on competition. The proposed consolidations will not significantly increase applicant carriers' market power with respect to either the relatively narrow and specific markets in which [546] ex post competition takes place or in the broader markets in which ex ante competition takes place.

ESSENTIAL SERVICES

In analyzing whether a proposed consolidation will be consistent with the public interest, we consider whether a transaction would cause any harm to essential services. 49 CFR 1111.1(c), *Railroad Consolidation Procedures*, 366 I.C.C. at 92. Consolidations often cause shifts in market patterns and divert traffic away from non-included carriers. Sometimes carriers losing market share as a result of the consolidation may not be able to withstand the loss of traffic and must downgrade and perhaps eventually abandon their routes. Traffic diversions could even lead to financial failure of a railroad and liquidation of its system. It is not our duty to ensure preconsolidation levels of traffic for competitors. Our concern is the preservation of essential services, not the survival of particular carriers. 366 I.C.C. at 92.

In evaluating whether a proposed transaction will harm essential services, we use a two-step analysis. First, we determine whether any affected carrier faces financial

harm that would reduce its operational viability. In performing this analysis, we examine the traffic diversion evidence to determine the gross revenue impact on non-included carriers. Next we examine the cost evidence to determine the net revenue impact of the gross revenue reductions resulting from traffic diversions. We then examine the evidence of the financial conditions of the non-included carriers to determine whether any carrier faces a reduction of net revenues that threatens its ability to continue providing service over its existing system. If we determine that any carrier will incur revenue losses that threaten its ability to provide service throughout its system, then we proceed to the second step of our analysis. In this second step we determine whether the threatened services are essential, rather than peripheral. We consider the public need for the services and whether there are alternative services now available or whether other carriers would likely be willing and able to provide the services if those services were discontinued by the carrier currently providing them.

Upon review of our traffic diversion analyses (Appendix F), the cost evidence (Appendices H and I), and the financial conditions of the protestants (Appendix J), we conclude that no carrier will incur revenue losses as a result of the proposed transactions to a degree threatening its ability to continue to provide service over its system. Therefore, the proposed consolidations will not harm essential services and we need not proceed to the second step in our analytical framework.

[547] Our analysis of the traffic diversion studies and of the cost and financial status evidence shows that the primary transactions, considered without including the impact of the public interest conditions we impose, would divert revenues from two carriers to a degree they might not be able to absorb and still continue operating at present levels. Those carriers are SP and MKT. We are

imposing conditions on the transactions for competitive reasons, however, that will have the collateral effect of largely or totally negating the transactions' financial impacts on those two carriers.

As a result of the proposed consolidations, SP will be subject to diversions of traffic with gross revenues of about $54.5 million. This gross revenue loss will cause a reduction in net revenues of about $11.8 million. We are imposing a grant of SP's requested trackage rights over MP's lines between Kansas City and St. Louis on the transactions. These trackage rights will not reduce the amount of the traffic diversions incurred by SP because SP performed its traffic study assuming it would have access to St. Louis from Kansas City over the line it purchased from the Rock Island in the *Tucumcari* case. Our approval of the trackage rights, however, will save SP the cost of rehabilitating the former Rock Island line. That cost would be about $100 million.

The annual cost of capital for a railroad on $100 million exceeds the $11.8 million net revenue loss SP may incur as a result of traffic diversions. SP will, of course, have to pay MP a reasonable rental for the use of the Kansas City-St. Louis line. However, use of the MP line, rather than rehabilitating the former Rock Island line, should result in substantial savings to SP which will largely offset the net revenue impact of traffic diversions.

Traffic diversion from MKT should cause gross revenue reductions of about $18.8 million.[82] Our approval of MKT's north-end trackage rights (Kansas City-Omaha/Council Bluffs, Union-Lincoln, NE, and Kansas City-Topeka) however, should enable MKT to divert traffic with gross revenues of about $21.2 million from appli-

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[82] This amount includes diversions as a result of the primary transactions only. We have concluded that MKT will not incur further diversions as a result of the CNW settlement (see Appendix (G).

cants. Therefore, traffic diversions by MKT from applicants as a result of the north-end trackage rights should fully off-set traffic diversions by applicants from MKT as a result of the primary transactions.

In evaluating the impact of a proposed consolidation on essential services, we consider cumulative impacts and crossover effects. In recent years, competitive relations among western railroads have been altered by the BN acquiistion of the St. Louis-San Francisco Railway Co., by the SP's acquisition of Rock Island's Tucumcari line, by the liquidation of the Rock Island, and the reorganization of the Milwaukee as a midwest [548] regional, rather than a transcontinental, carrier. The impacts of the proposed transactions, considered in light of these recent developments, do not appear to threaten any carrier financially. BN and SP have generally benefited from the recent restructuring. KCS does not contend that its essential services are threatened by the proposed transactions. ATSF asserts that the cumulative impacts of the proposed transactions and the other recent western railroad acquisitions will have an impact on its operations. ATSF, however, is an aggressive carrier and has had a growing traffic base and increasing revenues in recent years. Further, its policy witnesses have acknowledged that it will have the opportunity to develop competitive responses to the proposed consolidations before the full impact of the consolidations is felt. MKT has been affected by the recent rail restructuring developments in the West, particularly by the BN-Frisco consolidation. MKT, however, will be in a position to divert as much, if not slightly more, traffic from applicants than it stands to lose to applicants as a result of our approval of the proposed transactions subject to MKT's north-end trackage rights. Therefore, the effect of this transaction on MKT's financial condition should be either neutral or slightly positive.

We conclude that the proposed transactions, subject to the imposed public interest conditions, will not harm essential services.

THE PACIFIC RAILROAD ACTS

SP argues that the proposed consolidation of the UP and WP is precluded by the Pacific Railroad Acts[83] under which both UP and the Central Pacific Railroad Company (now part of the SP) were originally built. SP alleges that the proposed UP/WP consolidation would destroy the required one continuous UP/SP transcontinental rail line, permit the resulting consolidated railroad to discriminate against SP, and destroy the contractual relationships created by the Pacific Railroad Acts. SP argues further that the Commission cannot use its immunity powers under 49 U.S.C. 11341(a) to exempt the proposed transaction from the requirements of the Pacific Railroad Acts.

We do not agree with SP that the Pacific Railroad Acts preclude our approval of a consolidation which we find otherwise to be in the public interest. We have determined that the consolidation would not violate the one continuous line provisions of the Pacific Railroad Acts or any contractual obligations allegedly arising under those Acts. Although it appears that the UP/WP consolidation may potentially violate the non [549] discrimination provisions of the Pacific Railroads Acts, we have determined that we can and should immunize the consolidation from the operation of those provisions. We have considered the policies of the Pacific Railroad Acts however in evaluating the proposed UP/WP consolidation under the public interest standard.

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[83] Act of July 1, 1862, 12 Stat. 489-92; Act of July 2, 1864, 13 Stat. 356, *codified* at 45 U.S.C. 83.

Passage of the Pacific Railroad Acts

The Pacific Railroad Acts represent the public involvement in the creation of the first transcontinental railroad in this country. The potential of such a railroad was recognized long before passage of the 1862 Act,[84] but it took the exigencies of the Civil War to galvanize Congressional action on the railroad.[85] The railroad was viewed as necessary for the movement of troops and material to secure the safety of the Pacific States, not only from Confederate forces, but from adventuring foreign powers as well. *See United States* v. *Union Pacific R. Co.*, 91 U.S. 72, 79 (1875).

The need for public involvement in a project of such magnitude had become apparent during the years of effort spent trying to create a privately financed railroad. As Justice Rehnquist observed for the Court in *Leo Sheep*, 440 U.S. at 671:

> The building of the railroad was not to be the unalloyed product of the free enterprise system * * *

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[84] A plan for the construction of a railroad from the south shore of Lake Michigan to a western terminus in northern California or Oregon was proposed by Asa Whitney in 1844.

[85] The Civil War also removed an impediment in Congress to construction of the railroad, for prior to the war Congress was badly split along sectional lines on the appropriate location of the route. Whitney had proposed a northern corridor route. Senator Gwin of California, a Southern sympathizer, had proposed a route running from Memphis through Ft. Smith and Albuquerque to Los Angeles. Thomas Hart Benton of Missouri advocated a "great central national highway" beginning in St. Louis. 2 A Nevins, Ordeal of the Union (1947) quoted in *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 671 (1978) (*Leo Sheep*). The split was so bad that, in 1854, Senator Stephen A. Douglas of Illinois suggested the construction of a northern, central and southern route each with connections in the East. With the advent of the Civil War the Senators and Representatives of the Southern States were no longer present in Congress and the sectional disputes largely disappeared. *Id.* at 674.

> the venture was much too risky and much too expensive for private capital alone * * * private investors would not move without tangible government inducement.

The Pacific Railroad Acts provided that inducement.

The original Act of 1862 chartered the Union Pacific Railroad Company and authorized it, the Central Pacific Railroad Company and another existing railroad to construct a line of railroad from the Missouri River to the Pacific Ocean.[86] The Act provided for a right-of-way through [550] public lands, granted public lands to the railroads in alternate lots, and provided for financial support through bonds of the United States. (Sections 2, 3, 4 and 5).

Private investment remained sluggish even with the public involvement, and construction of the UP did not begin until July 1865, three months after the end of the Civil War. Between 1865 and 1869, the UP (which was laying track westward from Council Bluffs, IA) and CP (which was laying track eastward from Sacramento), engaged in a race for the land grants that went with each mile of track laid. The race culminated on May 10, 1869, with the joining of the two lines by the driving of the golden spike at Promontory, Utah.[87]

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[86] *See* Sections 1 and 9 of the Act. The Central Pacific Railroad Company of California was formed in 1861 by the "Big Four" western investors-Leland Stanford, Mark Hopkins, Collis P. Huntington and Charles Crocker. A delegate was sent to Congress that same year to lobby for the government assistance embodied in the Pacific Railroad Acts.

The other road was the Leavenworth, Pawnee and Western, later to become part of the Union Pacific.

[87] A general discussion of the legal and business history of the development of the transcontinental railroad is contained in *Leo Sheep*, 440 U.S. at 670-77. The terms of the Pacific Railroad Acts are generally described in *United States* v. *Union Pacific Railroad*, 160 U.S. 1, 20-26 (1895).

Specific Provisions of the Pacific Railroad Acts

SP relies on two provisions of the Pacific Railroad Acts for support of its position. First, SP cites the language appearing in section 12 of the 1862 Act requiring that:

> * * * the whole line of said railroad and telegraph shall be operated and used for all purposes of communication, travel, and transportation, so far as the public and government are concerned, *as one connected continuous line.* [Emphasis added.]

Second, SP addresses section 15 of the 1864 act which reiterates that the transcontinental railroad is to be operated as one continuous line and:

> * * * in such operation and use, to afford and secure to each, equal advantages as to rates, time and transportation *without any discrimination of any kind* in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others. [Emphasis added.]

We will discuss each of these provisions, and the rights arising under them, in turn. We will then address provisions of the Interstate Commerce Act and other provisions of the Pacific Railroad Acts which are pertinent to the issues raised by SP.

One Continuous Line: A prominent Congressional concern throughout the consideration of the Pacific Railroad Acts was the possibility that the transcontinental railroad might never be completed. Congress feared that the Government lacked authority to compel construction through the lands of a State;[88] that the terrain would prove im-

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[88] Remarks of Senator Morrill, Cong. Globe, 37th Cong., 2d Sess. 2679 (1862).

penetrable;[89] or that the [551] railroad companies would seek to build scattered segments of track in order to profit from bonds and lands granted under the Acts on the basis of completed trackage.[90]

Section 17 of the 1862 Act clearly expresses Congress' concern with physical completion of an entire, uninterrupted line by providing that a certain percentage of the bounds authorized by the Act be set aside pending completion of the entire road,[91] and providing that the entire railroad should be forfeited to the Government if the roads were not completed so as to "form a continuous line of railroad, ready for use * * *".

The language of the Act, however, addresses more than just the construction. It also requires the road to "be operated and used" as "one continuous line." The Supreme Court has held this language to require UP to operate its trains to and from the eastern terminus of its line in Council Bluffs, IA, rather than terminate its trains at Omaha, NE, on the western side of the Missouri River. *Union Pacific R. R.* v. *Hall*, 91 U.S. 343 (1876). The Court interpreted the "one continuous line" requirement at 353-54:

> It is a requisition made for the convenience of the public. An arrangement * * * by which freight and passengers destined for or beyond the eastern terminus are stopped two or three miles from it and transferred to another train, and again transferred at the terminus, or by which freight and passengers going west from the eastern end of the line must be

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[89] Remarks of Representative Kellogg, Cong. Globe, 37th Cong., 2d Sess. 1944 (1862).

[90] Remarks of Senator Latham, Cong. Globe 37th Cong., 2d Sess. 2789 (1862); Remarks of Representative Shellabarger, Cong. Globe, 37th Cong., 2d Sess. 1912 (1862).

[91] This provision was repealed by section 7 of the 1864 Act because it proved too burdensome on construction.

> transferred at Omaha, breaks the road into two lines, and plainly is inconsistent with continuous operation of it as a whole.

The Court later indicated more specifically that the obligations under the one continuous line language extended to the maintenance and operation of each railroad as a functional part of the transcontinental road. In discussing the parallel obligations concerning telegraph lines, the Court determined that Congress had intended:

> * * * that each company receiving aid from the government should itself maintain and operate or control, or should provide for the maintenance, *on its own route*, and under its own control of a telegraph line for the accommodation of both the government and the general public.

United States v. *Union Pacific Railway*, 160 U.S. 1, 28 (1895) (emphasis added).

We conclude that the "one continuous line" language of the Pacific Railroad Acts was intended to secure the permanent physical connection of a transcontinental route and the conduct of through operations over it. [552] This provision will not be violated by the proposed transactions for the operating plan set forth by UP and WP does not contemplate closing the Ogden gateway to SP traffic. With SP's extensive trackage in northern California, it will maintain a strong position for interline traffic with UP even after the consolidation. Furthermore, we believe that the fundamental purpose of the "one continuous line" provision will also be satisfied by the existence of several other alternative transcontinental routes, including the SP-DRGW route as discussed further below.[92] The Commission previously implied such an

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[92] As discussed elsewhere in this decision, we are granting trackage rights to DRGW over the MP line between Pueblo, CO, and Kansas City, which will even strengthen the competitiveness of this transcontinental route alternative to the UP and SP route.

interpretation in *Central Pacific*, 328 I.C.C. at 355, where we noted:

> [T]he Rio Grande now maintains through routes and joint rates with the Southern Pacific at Ogden, and by means of its several eastern connections also operates as one connected, continuous central or Overland Transcontinental line through Ogden and the Missouri River to points beyond.

The Nondiscrimination Clause: As the Supreme Court explicitly noted in *United States* v. *Union Pacific R. R. Co.*, 226 U.S. 61, 91 (1912), Congress did not stop with the requirement of physical continuity of the one permanent road to the Pacific coast. It provided further that "facilities as to rates, time and transportation shall be without any discrimination of any kind in favor of either of said companies or adverse to the road or business of any or either of the others * * *."

The nondiscrimination provision was added by Section 15 of the Act of 1864.[93] Section 15 also declared that any company then or thereafter incorporated should have the right to connect its road with the road and branches provided by the Pacific Railroad Acts. From its inception the nondiscrimination clause provided the means for all railroads connecting with the transcontinental route constructed under the Pacific Railroad Act to be treated equally.[94] Under the terms of this Act, the later-built

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[93] This provision was added after both CP and UP had assented to the terms of the original agreement in the 1862 Act. CP's assent was due six months after the original Act (section 9) and UP's assent was due one year after the original Act (section 7). The nondiscrimination provisions have been in effect for approximately 118 years, but these provisions were themselves an exercise of the authority retained in Congress to alter, amend or repeal the original Act as discussed further in this decision. *See Union Pacific Co.* v. *Mason City Co.*, 199 U.S. 160 (1905). The nondiscrimination clause did not constitute a part of the original agreement between the federal government and the Pacific railroads.

[94] Congress reaffirmed this policy by the Act of June 20, 1874, (18 Stat. 111) which made it a misdemeanor for any officer or agent of

[553] WP to the west and DRGW to the east are entitled to be treated on the same terms as the original Pacific Railroads. Thus, SP/CP's connection with UP stands on the same statutory footing as any other connecting railroad. *Central Pacific*, 327 I.C.C. 345.

After this consolidation, UP will favor WP over SP where it can. In this regard, the UP/WP consolidation would appear to violate the nondiscrimination provisions of the Pacific Railroad Acts. Applicants argue that the nondiscrimination clause applies only to the "operation and use" of the lines constructed pursuant to the Pacific Railroad Acts and therefore cannot bar UP's acquisition of ownership and control of WP. This distinction is without merit since applicants' operating plan, presented as part of the control application, clearly indicates the consolidated system's intent to favor WP over SP.

However, the potential violation of the nondiscrimination clause does not bar our approval of UP's application to control WP.[95] As discussed below, the Commission is empowered to immunize the carriers from operation of

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the companies authorized to construct the transcontinental roads for any companies engaged in operating either of the roads) to discriminate against any connecting road and to:

> . . . refuse to operate and use the road or telegraph under his control, or which he is engaged in operating for all purposes of communications, travel, and transportation, so far as the public and government are concerned, as one continuous line, or shall refuse, in such operation and use, to afford and secure to each of said roads equal advantages and facilities as to rates, time, or transportation without any discrimination of any kind in favor of or adverse to, the road or business of any or either of said companies.

[95] In light of our disposition of this issue we have not discussed the possible impact of the subsequently enacted nondiscrimination provisions of the Interstate Commerce Act on the present applicability of the Pacific Railroad Acts. *See* 49 U.S.C. 10701(c), 10745, 10703(a)(1), and 10741(b).

the nondiscrimination provisions where, as here, we have found that the UP/WP consolidation is in the public interest.

Contract Rights Under the Pacific Railroad Acts. SP also argues that the proposed UP/WP consolidation would abrogate certain vested or contract rights guaranteed CP under the one continuous line and nondiscrimination clauses of the Pacific Railroad Acts. SP suggests that in assenting to the terms of the Pacific Railroad Acts it actually entered into a partnership with the government and UP. We are not persuaded by these arguments.

It is true that the Pacific Railroad Acts created certain rights in both the United States government and the railroad companies, and that the United States is bound by their terms:

> [The United States] cannot legislate back to themselves, without making compenastion, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection * * * No change can be made in the title created by the grant of the lands or in [554] the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable.

Sinking Fund Cases, 99 U.S. 700, 719 (1878) (*Sinking Fund Cases*).[96]

Thus, the Acts did create contract rights in the railroad companies to receive land grants and other subsi-

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[96] The Court went on to note that Congress "cannot undo what has already been done, and it cannot unmake contracts that have already been made, but it may provide for what shall be done in the future and may direct what preparations shall be made for the due performance of contracts already entered into." 98 U.S. at 721.

dies in return for constructing the railroad. However, SP's contention that the Pacific Railroad Acts created vested rights in certain railroad operations is contrary to both the terms of the Acts and their legislative history. The terms of the two clauses relied on by SP create no such rights. Indeed, section 12 of the 1862 Act, specifically provides that the whole line of railroad shall be operated and used for travel and transportation "so far as the public and the Government are concerned." This same limiting language is repeated in section 15 of the 1864 Act and applied to the nondiscrimination provisions by the words "in such operation and use." These clauses created rights only in the government which could be asserted against the operating railroad companies and corresponding obligations, not rights, on the part of the railroads.

This interpretation is consistent with the overall scheme of the Acts. Congress sought to encourage the construction of the transcontinental railroad through the use of private companies. "But the primary object of the government was to advance its own interests, and it endeavored to engage individual cooperation as a means to an end—the securing [of] a road which could be used for its own purpose." *United States* v. *Union Pacific R. R. Co.*, U.S. at 81. "Indeed, the whole act contains unmistakable evidence that, if Congress was put to the necessity of carrying on a great public enterprise by the instrumentality of private corporations, it took care that there should be no misunderstanding about the objects to be attained or the motives which influenced its action." *Id.* at 82.

The argument that the Acts created vested or contract rights in SP regarding prospective railroad operations is further undermined by the clear retention of authority in Congress to amend the Acts, and the "special notice" this retention gives to the parties. *See Sinking Fund*

Cases, 99 U.S. at 720. This retained power to amend is discussed further below.

Additionally, we cannot find that the Pacific Railroad Acts created a contractual or partnership relationship between CP and UP. No private contractual relationship is evident from the terms of the Act. Instead, it is apparent that Congress undertook to use several private corporations "to [555] bring about the construction of the road, with the resulting advantages to the Government and the public." *Burke* v. *Southern Pacific R. R. Co.*, 234 U.S. 669, 680 (1914). The Acts required separate assents from the various railroad companies and provided the framework for the subsequent race between UP and CP. The race to construct the track for the accompanying land grants clearly benefitted the government under its contracts with the roads and just as clearly created an adversarial, not a partnership, relation between CP and UP.

What the Acts did create was a series of bilateral contracts between the government and each of the involved railroad companies, but no contractual relationships between the railroad companies. The bilateral relationships between the government and the individual railroad companies have been acknowledged on numerous occasions,[97] but to our knowledge no court has ever held a contractual relationship existed between the railroad companies.

Each of the railroads has enjoyed benefits from the operation of the original transcontinental route in a nondiscriminatory manner as dictated by the public interest. It is also true that each railroad has an interest (as opposed to a contract right) in the operation of the other road. CP's interest can fairly be characterized as that of a third party beneficiary to the contract between the

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[97] *See* for example, *United States* v. *Union Pacific R. R. Co.*, 91 U.S. 72; *Sinking Fund Cases*, 98 U.S. 71; *United States* v. *Union Pacific Railway*, 160 U.S. 1 (1895).

government and the UP. The Commission has at times presupposed the extent of the public interest in operations over the SP-UP route and taken an expansive approach in describing the SP-UP relationship. *See Central Pacific*, 76 I.C.C. at 524 ("reciprocal rights"). However, that interpretation is not supported by either the terms of the Acts or their legislative history.[98]

In summary, the Pacific Railroad Acts created contract rights in the railroads to receive land grants and other subsidies in return for constructing the first transcontinental railroad. The Acts set forth certain forms of operations which were determined to be in the public interest and created a right in the government to amend or repeal these provisions. But the Acts created no vested rights in the involved railroads nor any private contractual relationship between CP and UP. Since the passage of the Acts both the CP/SP and UP have stood only as third party beneficiaries each to the other's contract with the government.

[556] *The Transportation Act of 1920*

The Transportation Act of 1920 first established our jurisdiction over railroad consolidations now found in 49 U.S.C. 11341-11350. The effect of the 1920 Act was to give the Commission exclusive jurisdiction over all phases of consolidations by regulated carriers. *See*, for example, *Schwabacher* v. *United States*, 334 U.S. 182, 197 (1948); *Gilbertville Trucking Co.* v. *United States*,

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[98] The presupposed public interest in particular operations over the central corridor route derives in large measure from the fact that:

> At the time the Commission approved the acquisition of control of the Central Pacific by the Southern Pacific, and imposed the condition regarding the solicitation of traffic via the lines of the Union Pacific through Ogden, no other connecting carrier was in an actual position to compete for that traffic. *Central Pac. Ry. Co. Control*, 317 I.C.C. 469, 472 (1962).

371 U.S. 115, 122 (1962); *McLean Trucking Co.*, 321 U.S. 67.

The Commission's Immunity Power. The plenary and exclusive nature of Commission jurisdiction over consolidations is confirmed by the immunity provisions which were added by the Transportation Act of 1920. These provisions are now contained in 49 U.S.C. 11341(a) which provides:

> A carrier, corporation, or person participating in [the approved transaction] *is exempt from the anti-trust laws and from all other law*, including State and Municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control of franchises acquired through the transaction. [Emphasis added.]

The immunity clause is unambiguous on its face: it applies to *all laws*, both State and Federal, as necessary to allow implementation of an approved consolidation.[99] We are bound to give effect to its terms, and it is unnecessary to engage in the methods of statutory construction advanced by SP.[100]

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[99] SP's argument that the exemption provision applies only to "prohibitory or restraining laws" proves too much, for if the Pacific Railroad Acts do not restrain or prohibit the consummation of the proposed UP/WP transaction then it is unnecessary to consider them here. If the Acts do restrain or prohibit consummation then the exemption applies.

[100] *See, e.g., Caminetti* v. *United States*, 242 U.S. 470, 485 (1917); accord, *e.g., Blue Cross Ass'n* v. *Harris*, 622 F.2d 972, 977 (8th Cir. 1980); *I.C.C.* v. *Southern Ry.*, 543 F.2d 554, 536 (5th Cir. 1976). SP urges our examination of the exemption provision under the maxims of "noscitur a sociis" and "ejusdem generis." The Supreme Court has noted that these maxims of construction "have no place * * * except in the domain of ambiguity." *Russell Motor Car Co.* v. *United States*, 261 U.S. 514, 579 (1923). *See also Texas* v. *United States*, 292 U.S. 522, 534 (1934).

The express immunity provisions of the statute are a necessary complement to the Commission's authority to approve or disapprove consolidations, mergers, or acquisitions of control. Without the immunity provisions of section 11341(a), approved transactions would be subject to attack under various Federal and State laws, undercutting our authority to supervise the national transportation network.

The courts have recognized the broad reach of our immunity power. Suits based on statutes other than the Interstate Commerce Act, challenging Commission-approved transactions, have been regularly dis- [557] missed on the basis of the immunity provisions of section 11341 (a).[101] Contrary to SP's contentions, the bases of these lawsuits, in many cases, were not "prohibitory or restraining statutes" similar to the antitrust laws. In fact, the immunity provision's application to the Pacific Railroad Acts has received judicial recognition.[102]

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[101] *See, e.g., Texas* v. *United States*, 292 U.S. 522 (1934) (Texas State law not applicable to Commission-approved transactions); *Seaboard A.L. R. Co.* v. *Daniel, supra*, 333 U.S. at 125-26 (South Carolina State law not applicable to Commission-approved transactions); *Suffin* v. *Pennsylvania R. R. Co.*, 396 F.2d 75 (3d Cir. 1968) (Shareholder derivative suit challenging Commission-approved merger dismissed on basis of immunity provisions of the Act); *Brotherhood of Locomotive Engineers* v. *Chicago & N.W. Ry.*, 314 F.2d 424 (8th Cir. 1963) (Commission-approved merger relieved of provisions of Railway Labor Act by immunity provisions of the statute); *Minneapolis & St. L. Rwy. Co.* v. *United States*, 361 U.S. 173 (1959), *reh. den.* 361 U.S. 945 (1960) (antitrust suit barred by immunity provisions of the Act); *Interstate Investors, Inc.* v. *Trans-Continental Bus System, Inc.*, 310 F. Supp. 1053 (S.D. N.Y. 1970) (antitrust suit barred by Commission approval of merger).

[102] In *Southern Pacific Co.* v. *United States*, 277 F. Supp. 671, 683(1) (D. Neb. 1967), *aff'd* 390 U.S. 744 (1968), the Court found the preferential solicitation condition imposed by the Commission in *Central Pacific*, 76 I.C.C. 508, to be contrary to the nondiscrimination provisions of the Pacific Railroad Acts, but that the condition "embodied a Commission-approved exemption pursuant to a provision of the Transportation Act of 1920, now codified at 49 U.S.C. [11341]."

The Act of 1920 as an Amendment of the Pacific Railroad Acts. In addition, the Transportation Act of 1920 may also be viewed as an amendment of the Pacific Railroad Acts. This characterization is conceptually consistent with Congress' retained ability to amend the Pacific Railroad Acts to promote the public interest. Section 18 of the 1862 Act provided that: "Congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act." This power was confirmed by section 22 of the 1864 Act which simply declared that "Congress may at any time alter, amend, or repeal this act."

Taking both the 1862 Act and the 1864 Act together, the Supreme Court concluded that Congress not only retains but has given special notice of its intention to retain, full and complete power to make amendments to the charter which come within the scope of its legislative power. *Sinking Fund Cases*, 99 U.S. at 720. Although the Court was referring specifically to the charter of UP, the retained power of Congress reaches each road privileged under the Pacific Railroad Acts. *See United States* v. *Union Pacific R. R. Co.*, 226 U.S. at 92.

Through its reserved power to amend the Pacific Railroad Acts Congress clearly retained an ability to ensure, prospectively, that the operations of the railroads it helped to build would be conducted in the public interest. That power has been exercised on several occasions, including the 1864 Act first introducing the nondiscrimination clause. In the specific area of railroad consolidations, the Transportation Act of 1920 [558] may also be viewed as an exercise of this power.[103] The original rail-

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[103] Both the 1862 Act and the 1864 Act contained consolidation clauses providing that any two or more of the railroads mentioned in the Act might form themselves into one consolidated company (section 16 of each act). These provisions simply indicate Congress' advance approval of consolidation after the risks of construc-

roads of the transcontinental route are clearly subject to our consolidation jurisdiction. *See Central Pacific*, 76 I.C.C. 508 and *Chicago & N.W. Ry. Co.—Control*, 347 I.C.C. 556 (1974). It cannot be argued that a future UP/CP consolidation would be beyond our jurisdiction, even though the consolidation provisions of the Pacific Railroad Acts appear to give advance approval of such a consolidation. Instead, the policies of these and other provisions of the Pacific Railroad Acts are factors to be considered in our determination of the public interest under 49 U.S.C. 11343 just as the policies of the antitrust laws are considered. *See Norfolk Southern, supra.* The Congressional delegation of authority over rail consolidations to this Commission in effect constitutes an amendment of the Pacific Railroad Acts, designating the Commission to determine thereafter the public interest in the specific area of rail consolidations.

Application to the Pacific Railroad Acts. In 1923 in its first determination under its authority to review consolidations, the Commission recognized the effect of the Transportation Act of 1920 upon the Pacific Railroad Acts. In *Central Pacific*, 76 I.C.C. 508, a "question of importance" before the Commission was the legality of an 1885 lease of the CP lines to SP. (*Id.* at 517) The Supreme Court had previously found SP's control of CP violated the Sherman Act and rejected the 1885 lease and prior control as a defense to the application of the antitrust laws. The Court found that, because CP held franchises from the Federal Government arising from the Pacific Railroad Acts,[104] the 99-year lease by CP to

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tion had been shared by separate, more manageable companies. Congress perceived that operating the railroad once it was built would entail different considerations, perhaps conducive to consolidation. Subsequent events would confirm this perception.

[104] "[T]his court has repeatedly recognized the fact that the Central Pacific was a corporation receiving much of its authority and power from acts of Congress. *California* v. *Central Pacific*

a rival and competitive company (SP) could not legally be made without authorization by Federal legislation. In the absence of such action, CP was held not to have the corporate capacity to make the lease.[105] *United States* v. *Southern Pacific Co.*, 259 U.S. 214, 234 (1922).

[559] Thus, when the subsequent application for approval of the SP/CP consolidation was addressed by the Commission, a threshold question was CP's lack of capacity arising from the franchises of the Pacific Railroad Acts, to enter the lease upon which SP's control of CP was based. After observing that in 1885 and then in 1923, CP had authority under its State charter to enter the lease, the Commission relied upon its immunity power [now in 49 U.S.C. 11341(a)] to exempt the involved carriers from the franchise terms of the Pacific Railroad Acts. In reaching this result, the Commission stated that Section 5 of the Interstate Commerce Act [now 49 U.S.C. 11343(a)] authorized it to approve acquisitions of control which it finds to be in the public

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R.R. Co., 127 U.S. 1." *United States* v. *Southern Pac. Co.*, 259 U.S. 214, 234 (1922). In *California* v. *Central Pacific R.R. Co.*, 127 U.S. 1 (1887), the Court discussed "the fundamental franchise [that] was given [CP] by the acts of 1862 and the subsequent acts, to construct a railroad from the Pacific Ocean * * * until it should meet the Union Pacific * * *". *Id.* at 38.

[105] The Court's analysis was based on the historical precedent of transactions among railroads as well as the Pacific Railroad Acts. On October 31, 1864, CP assigned all its rights under the Pacific Railroad Acts so far as construction of the rail line between San Jose and Sacramento to a California corporation then known as the Western Pacific Railroad Company. The assignment was ratified by Congress in an act of March 3, 1865, 13 Stat. 504, as an amendment to the Pacific Railroad Acts. In August 1870, CP and the then existing Western Pacific were consolidated into one corporation under the name of the CP. "Such consolidation was authorized by the 16th section of the act of Congress of July 1st, 1862, and the 16th section of the act of July 2, 1864, taken in connection with the 2d section of the act of March 3, 1865 * * *" *California* v. *Central Pacific R.R.*, 127 U.S. at 38-9.

interest and that the immunity provisions of that section [now contained in section 11341(a)] were intended by Congress "to remove all active restraints by law and grant authority so far as necessary to enable the carriers affected by [its] order to do anything authorized or required thereby." *Central Pacific*, 76 I.C.C. at 517-518. The Commission concluded that the impediment to CP's lease which was imposed by the Pacific Railroad Acts' franchise was such a restraint as has been removed by the immunity provisions.[106] SP, whose control of CP would otherwise have been invalid under the Pacific Railroad Acts franchise, should not now be heard to argue that the exemption cannot be applied to the UP-WP consolidation.

Historical Development of the Pacific Railroads after the Pacific Railroad Acts

In order to consider the policies expressed in the Pacific Railroad Acts, and whether we should authorize an exemption from the Acts, we have also examined the development of the involved railroads after the Acts became effective.

The Big Four western investors who developed the CP gained control of the SP about 1870. The Southern Pacific Railroad Company had been incorporated in 1865 to build a railroad south from San Francisco to southern California and then eastward. Through construction and the lease of various properties the SP reached New Orleans in 1883.[107]

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[106] The Commission also concluded that the immunity provisions exempted the control transaction from the antitrust laws which the Court had earlier found to be violated.

[107] The CP was the beneficiary of this extensive system. "From 1883 to 1885 the Central Pacific was the lessee owner of a system of leases, and the system was known as the Central Pacific and Leased Lines." *United States* v. *Southern Pac. Co.*, 259 U.S. at 228.

[560] After the golden spike was driven on May 10, 1869 completing the first transcontinential route, the UP continued to look westward. UP began construction of the Oregon Short Line, and thereby an outlet to the Pacific, in 1881. Partly in response to the UP's action, in 1885 the CP leased its entire line to SP. CP later argued that the lease was "not only in the best interests of, but absolutely necessary that, the Central Pacific Railroad Company, in order to maintain itself * * * should be operated in connection with a friendly through line to the waters of the Atlantic." Quoted in *United States* v. *Union Pacific R. R. Co.*, 226 U.S. at 90.

In 1901, UP attempted to acquire stock control of SP, and complete a unified transcontinental route as envisioned by the Pacific Railroad Acts. But by then the Sherman Act had become law and with SP's control of CP, the Supreme Court held, in 1912, that the UP acquisition of SP violated the antitrust laws.[108]

As discussed above, SP's control of CP was allowed to continue under the approval of the Commission which subsequently had been empowered to immunize such transactions from the antitrust laws. *Central Pacific*, 76 I.C.C. 508.

While the UP and SP were battling over control of the Overland transcontinental route, other railroads continued to develop alternate routes. The SP's southern route was substantially in place by 1883. The Atchison, Topeka and Santa Fe also completed, in 1885, a southern transcontinental line. The Northern Pacific and Great Northern (now the Burlington Northern Railroad Com-

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[108] The control through the lease of 1885 developed into stock control in 1899. Although this control antedated the UP control of SP, the UP prosecution was instituted and decided before a case was brought against SP.

pany) each completed northern transcontinental lines in 1883 and 1893 respectively.[109]

An alternate route also developed in the central corridor. The DRGW, connecting Ogden on the west with Denver and Pueblo on the east, was completed as a narrow gauge road in 1883 and converted to standard gauge by 1890. Operations over the WP from Salt Lake City to San Francisco began in 1911. Together with connections to the east these roads formed a second central corridor transcontinental route.

After our approval of the SP/CP consolidation in 1923, the DRGW undertook a substantial effort to improve its route in order to compete for transcontinental traffic.[110] That effort culminated in the recognition [561] that the DRGW and connections compete with the UP for transcontinental traffic and the modification of a condition imposed in 1923, as part of the Central Pacific conditions, eliminating the preference for UP and requiring SP to favor the central corridor for CP territory traffic without discrimination between UP and DRGW at the Utah gateway. *Central Pacific*, 328 I.C.C. 345.

The most recent pertinent event in the development of the western railroads came in 1980. *Tucumcari*, acquisi-

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[109] With the completion of these routes the major corridors anticipated by planners prior to the Civil War had become reality. See note —, *supra*.

[110] In 1931, the Commission granted authority for DRGW to acquire control of the Denver & Salt Lake Railway Company, and to construct the Doiscro cutoff through the Moffat tunnel. *See Denver & S.L. Ry. Co. Control*, 170 I.C.C. 4 (1930) and 175 I.C.C. 542 (1931). In November 1935, trustees were appointed to manage the DRGW property. The trusteeship ended April 10, 1947, with the DRGW emerging in the best physical and financial condition in its history, and positioned to "advantageously participate in the movement of transcontinental traffic * * *" *Central Pacific*, 317 I.C.C. at 473.

tion by the SP system of the former Rock Island line between Tucumcari, NM and St. Louis via Kansas City was approved. With this acquisition, SP established an efficient route to the Missouri River at Kansas City.

The present configuration of the western railroads finds both UP and SP conducting single system operations between the Missouri River and the Pacific Ocean,[111] the points Congress sought to connect by the Pacific Railroad Acts. BN and ATSF also operate between these points, and viable transcontinental competition for the original UP/CP route now exists in the northern and southern corridors as well as through the central corridor.

Conclusion

The Pacific Railroad Acts do not limit the Commission's ability to determine public interest in proposed rail consolidations or our power to approve transactions found to be in the public interest. That power was specifically reserved by Congress in the Pacific Railroad Acts themselves and delegated, in the area of rail consolidations, to the Commission by the Transportation Act of 1920. Consummation of a transaction approved by this Commission is immunized by 49 U.S.C. 11341 against the operation of other law including the Pacific Railroad Acts. However, as with the antitrust laws, we must consider the policies expressed in the Pacific Railroad Acts in evaluating proposed consolidations.

With the development of the western railroads since passage of the Pacific Railroad Acts, the fundamental purpose of these Acts has been fulfilled and the public interest now lies in encouraging competition among these available transcontinental routes, as discussed in detail elsewhere in this decision. The proposed transaction will enable the new system to offer improved single-system

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[111] UP serves Omaha/Council Bluffs, St. Joseph and Kansas City on the Missouri River, while SP serves Kansas City and St. Louis.

service. Further, subject to the [562] conditions imposed, the consolidation will not have a significant adverse impact on transcontinental rail service competition. Therefore, we determine that the proposed control of WP by UP should be exempted from the potential operation of the nondiscrimination clause of the Pacific Railroad Acts.

CONDITIONS

Criteria

Under 49 U.S.C. 11344(c) we have broad authority to impose conditions governing railroad consolidations. In deciding whether to impose conditions, our overriding concern is the public interest. *BN-Frisco*, 360 I.C.C. at 950. In our *BN-Frisco* decision we reexamined our policy regarding merger conditions. 360 I.C.C. at 950-952. We concluded that conditions generally tend to reduce the benefits to be derived from a consolidation and that conditions should not be imposed unless they will produce benefits outweighing their harm to the transaction. We then set forth criteria for the imposition of conditions. 360 I.C.C. at 951-952. These criteria, with slight modifications, have been incorporated into our regulations. 49 CFR 1111.1(d), *Railroad Consolidation Procedures*, 363 I.C.C. at 788-790, 792, and 366 I.C.C. at 78, 92-93.[112] We further refined our policy on conditions in *Traffic Protective Conditions*, 366 I.C.C. 112.

In our recent merger case decisions and rulemakings, we have identified two general categories of conditions. We have noted that conditions may be proposed to protect the interests of a competing *carrier* from merger impacts or to protect the *public* from anticompetitive

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[112] We refer to the criteria for imposing conditions to protect a particular carrier as 49 CFR 1111.1(d), as renumbered in the rail consolidation procedures rules. 49 CFR 1111.1(d) was formerly found at 49 CFR 1111.10(d) prior to the rulemaking in *Railroad Consolidation Procedures, supra.*

consequences, 363 I.C.C. at 789. In either case, the issue of whether conditions should be imposed in a consolidation goes essentially to whether the transaction will result in a lessening of the adequacy of transportation to the public. *CSX*, 363 I.C.C. at 577. The criteria for imposing conditions to protect a particular carrier have been specified in our merger general policy statement, 49 CFR 1111.1(d), 366 I.C.C. at 92. Our criteria for imposing conditions to protect the public have not been set forth in a similar comprehensive fashion and various parties to this proceeding have taken differing positions on the appropriate criteria for imposing public interest conditions in rail merger proceedings.

KCS contends that we should impose public interest conditions that are shown (1) to provide greater public-interest benefits in the form of [563] operating efficiencies or competition than harm to the merger or consolidation, or (2) to protect the public from anticompetitive consequences of a merger or consolidation. KCS asserts that we should impose conditions on mergers for the purpose of enhancing competition where adequate competition does not exist, if the conditions are feasible and not unduly burdensome on the merging carriers. It argues that a railroad consolidation proceeding is an appropriate vehicle for promoting a procompetitive restructuring of the railroad system serving the involved transportation markets. DOT and DOJ, on the other hand, take a much narrower view with respect to the circumstances under which public interest conditions should be imposed. DOT asserts that conditions should be imposed only where needed to ameliorate or eliminate reductions in competition resulting directly from the proposed cosnolidation. DOJ contends that conditions to a rail consolidation should be imposed only when we find that the merger—without conditions—may be anticompetitive and that the conditions sought are reasonably designed to remedy directly the anticompetitive effects

threatened by the merger. DOJ takes the position that before conditions can be imposed upon a merger, it must be shown that the merger may reduce competition in particular markets and that the proposed conditions will lessen or neutralize the anticompetitive thrust of the merger.

The position on conditions argued by DOT and DOJ is consistent with our current policy regarding conditions. The KCS position misinterprets our recent decisions. Further, the DOT/DOJ position represents better public policy than does the KCS position.

In *BN-Frisco*, we noted that certain conditions might not adversely offset a merger's anticipated benefits because the operational efficiencies or competition resulting from the condition are of greater benefit to the public interest than harm to the merger, 360 I.C.C. at 950. This is merely a statement of the fundamental principle that no condition should be imposed unless it offers benefits that outweigh its detriments. We use this principle to evaluate whether a particular condition is an appropriate response to a public interest problem arising from the merger. Neither in *BN-Frisco* nor in any subsequent rail merger proceeding have we taken the position that a condition should be imposed solely because it would provide public benefits outweighing its detriments regardless of whether it is needed to redress a problem arising from the merger.

The basic consideration for determining whether a need for a public interest condition exists is whether the transaction will have anticompetitive consequences (or threaten other possible harm to the public interest). If a transaction does not pose any problems of possible harm to the public interest, then no public interest conditions should be imposed. [564] If a transaction threatens harm to the public interest, then public interest conditions should be imposed if they are operationally feasible,

ameliorate or eliminate the harm threatened by the transaction, and they are of greater benefit to the public than they are detrimental to the transaction. If appropriate public interest conditions cannot be formulated, then the transaction should either be approved without conditions, if it offers benefits that outweigh the threatened harm; or be denied, if the harm outweighs the benefits. As we stated in *BN-Frisco*, conditions on a merger are not to be used to ameliorate longstanding problems which were not created by the merger, are not to be imposed if they are in no way related either directly or indirectly to the involved merger, and are not to be used to require a merged carrier to protect carriers against circumstances not caused by the merged carrier, 360 I.C.C. at 952.

Several considerations underlie our policy on public interest conditions. First, we should not use our conditioning powers to make consolidation proceedings vehicles for rail system restructuring. To do so would not be consistent with the Congressional intent underlying the statutory scheme governing railroad consolidations. Between 1920 and 1940 this Commission had a statutory role in the planning of rail system restructuring through mergers and consolidations. That statutory scheme proved ineffective and since 1940 rail system restructuring has been left primarily to the initiative of the private sector. Under this statutory scheme, our role in merger proceedings is to evaluate carrier-originated proposals to determine whether they are consistent with the public interest. To the extent governmental assistance is beneficial in formulating rail restructuring plans, DOT has statutory authority to provide such assistance. *See, e.g.*, 49 U.S.C. 1654(a)-(d). Further, the imposition of conditions on a transaction creates a disincentive for the parties to consummate the transaction. Therefore, imposition of conditions not related to possible adverse impacts of a consolidation might cause carriers to forego

a consolidation that would, without conditions, yield net public benefits.

Under the provisions of 49 U.S.C. 11344, we are directed to approve a transaction if it is consistent with the public interest. Imposing conditions unrelated to a merger's impact, upon a transaction otherwise consistent with the public interest, would be at odds with the Congressional policy that privately-initiated transactions should be approved so long as they are consistent with the public interest.

If a proopsed transaction is not in the public interest and the harm that would arise from it cannot be sufficiently reduced or eliminated by conditions related to the harm, then we should deny the merger rather than impose public interest conditions unrelated to the merger's impact for [565] the purpose of increasing public benefits to the point where they outweigh public harm. If a transaction needs to be restructured in order to make it consistent with the public interest, then such restructuring is best left to the voluntary actions of the parties. Our conditioning power should not be used to restructure a transaction beyond the scope proposed by applicants.

If we were to consider public interest conditions in consolidation proceedings which are not related to possible harm arising from the merger, then we would open the door to a vast broadening of the scope of consolidation proceedings. Such a broadening of the scope of these proceedings would substantially increase their complexity. This would increase the time required to decide these cases, contrary to Congressional intent that railroad consolidation proceedings be handled expeditiously.

In summary, we will not impose public interest conditions on a railroad consolidation unless we find that the consolidation may produce effects harmful to the public interest (such as an anticompetitive reduction of com-

petition in an affected market), that the conditions to be imposed will ameliorate or eliminate the harmful effects, that the conditions will be operationally feasible, and that the conditions will produce public benefits (through reduction or elimination of the possible harm) outweighing their harm to the merger.

DT&I Conditions

What has been said about the criteria we will apply in determining the appropriateness of imposing conditions has largely been developed in proceedings in which we have been reexamining the propriety of the imposition of the so-called DT&I standard traffic protective conditions. This reexamination culminated in our institution of a rulemaking by Notice of Proposed Rulemaking published in the Federal Register of July 10, 1980 (45 Fed. Reg. 46461) in which we concluded that we would no longer impose blanket DT&I Conditions, even on an interim basis as we did in the *BN-Frisco* merger proceeding, for the following six reasons:

1. The Conditions are contrary to the congressional policy expressed in the 4R Act of fostering intramodal rail competition;

2. The Conditions remove incentives for efficient operations by keeping carriers from pricing more efficient routes at lower rates;

3. The Conditions encourage unnecessary utilization of resources as carriers are forced to offer specialized services, instead of lower prices, to attract new business;

4. The Conditions hamper carrier efforts to rationalize their systems by freezing existing junctions and interchanges;

[566] 5. The Conditions stifle the ability of rail carriers to meet motor and water competition by allowing connecting rail carriers to block rate reductions; and

6. Existing statutory authority provides sufficient protection against the type of abuse the conditions are intended to preclude. *Traffic Protective Conditions*, 366 ICC 112.

No party to this proceeding has made a specific showing that would warrant imposition of DT&I conditions as each and every gateway in this proceeding and, accordingly we decline to impose them. We have approved, however, a portion of an agreement between C&NW and applicants similar in effect to the rate equalization provisions of the DT&I conditions. Here, the agreement applies to a limited number of gateways designed to protect the efficient transcontinental east-west movement of traffic through Chicago by those carriers (See discussion, *infra.*)

MISSOURI-KANSAS-TEXAS

MKT seeks trackage rights over MP's lines between San Antonio and Laredo, TX, and between San Antonio and Corpus Christi, TX, with use of related terminal facilities at Laredo and Corpus Christi (south-end trackage rights). MKT further seeks trackage rights over MP's line between Kansas City, MO, and Omaha, NE; between Union, NE, and Lincoln, NE; and over UP's line between Omaha and Council Bluffs, IA; and between Kansas City, MO, and Topeka, KS, with use of related terminal facilities (north-end trackage rights). Finally, MKT seeks trackage rights over MP's line between Sedalia and St. Louis, MO, and operation over tracks of the Terminal Railroad Association of St. Louis (St. Louis trackage rights). As an alternative to the proposed trackage rights, MKT seeks imposition of an indemnification condition and a condition requiring the continuation of UP-MKT run-through trains.

MKT contends that these conditions are necessary in order to ameliorate the anticompetitive impacts of the proposed consolidations and to protect it from revenue

losses that would threaten its ability to continue providing essential services.

We will first examine MKT's proposed conditions to determine whether any of them are necessary and appropriate responses to any public harms likely to arise from the consolidations.

MKT's St. Louis trackage rights are not related to any anticompetitive impacts of the consolidations. MKT already has a line to St. Louis. MKT's line, however, is more circuitous than is MP's and is subject to flooding. Therefore, the St. Louis trackage rights could cure certain [567] operational problems of MKT. We do not, however, impose conditions on consolidations in order to redress long-standing operational problems not related to the consolidations. The consolidations will not reduce competition between Kansas City and St. Louis and will not foreclose MKT from reaching St. Louis. Therefore, the St. Louis conditions do not address any harms to the public interest arising from the proposed transactions.

MKT asserts that its north-end and south-end trackage rights are necessary to ameliorate anticompetitive impacts on north-south traffic, especially grain shipments, between the Midwest, on the one hand, and, on the other, the Gulf ports and Mexico. In our analysis of competition we concluded that the UP-MP consolidation poses competitive problems with respect to traffic moving through the Omaha/Council Bluffs-Kansas City corridor and that carriers operating between Kansas City and the Gulf States face possible foreclosure of access to grain shippers north and west of Kansas City. We will examine the north-end and south-end trackage rights to determine whether they are appropriate responses to these competitive problems.

MKT's proposed north-end trackage rights will help offset the loss of UP as a friendly connection at Kansas City. These trackage rights will give MKT direct access

to shippers, especially grain shippers, at Topeka, Atchison, Lincoln, Omaha, and Council Bluffs. This access will prevent a loss of competitive rail service options available to shippers at those points. Direct access to shippers is very important in order for effective competition to exist for grain traffic. Shippers have the right to route their own traffic and can specify that MKT be included in the route, even if MKT does not serve their terminals. Grain shippers, however, are heavily dependent upon the railroads serving their facilities to supply them with large-capacity hopper cars needed for the efficient transportation of grain. This is especially true during peak seasons when grain cars are in short supply. Therefore, grain shippers are very reluctant to give the origin carrier less than its long-haul in a routing. Because MKT does not reach any Gulf ports that are not served by MP, grain shippers would be reluctant to specify a UP-Kansas City-MKT routing if a single system UP-MP routing is available.

MKT's north-end trackage rights will provide shippers with an effective competitive alternative. A number of shippers, including major grain shippers, in the territory served by the north-end trackage rights support MKT's trackage rights requests. MKT anticipates that it should be able to capture about 10 percent of the grain traffic available at the points reached by the north-end trackage rights. MKT's expectation of being able to obtain a 10 percent share of this traffic is reasonable, but in view [568] of the much larger railroads already serving this region, MKT's best efforts will likely be required to achieve that market share. On the other hand, MKT has understated the storage capacity of the elevators at the locations it seeks to serve. Therefore, MKT has understated the volume of traffic it might obtain if it achieves a 10 percent market share.

MKT's understatement is due to its very conservative 2.25 annual elevator turn-over factor (number of times

an elevator is filled and emptied over a one-year period). MKT presented data for eighteen elevators in the proposed north-end service area. The weighted average annual turn-over factor for these elevators is 3.7. These data, however, did not include certain large elevators. Large elevators have lower turn-over factors than do small elevators. Therefore, the weighted average for all elevators should be lower than the 3.7 factor that was calculated excluding the large elevators. In our opinion, a reasonable turn-over factor to be used in estimating the annual storage capacity of the elevators would be 3. MKT's factor of 2.25 appears to be clearly too low.

MKT's grain market impact study shows the basic capacity of the elevators in Omaha/Council Bluffs, Lincoln, Atchison, and Topeka to be 124.3 million bushels. Using a turn-over factor of 3, the total annual storage capacity of these elevators is 372.9 million bushels. This annual capacity converts to 109,676 carloads (3,400 bushels per car) compared to MKT's estimate of 82,274 carloads. Therefore, we conclude that MKT's annual storage capacity estimate is understated and that its estimated gain in revenues should be adjusted as follows:

	Grain	Non-Grain	Total
Kansas City-Omaha/Council Bluffs (including Lincoln)	$12,631,103	$795,735	$13,426,838
Kansas City-Topeka	7,677,677	73,950	7,751,627
Totals	$20,308,780	$869,685	$21,178,465

We conclude that MKT's north-end trackage rights will enable MKT to establish itself as an effective competitor for traffic originating in Omaha/Council Bluffs, Lincoln, Atchison, and Topeka. The presence of MKT as a new competitor at these points will alleviate the reduction in competition for traffic moving from those points to Kansas City and to Gulf ports.

We must next consider whether the proposed north-end trackage rights are operationally feasible. MKT plans to operate one train tri-weekly between Kansas City and Omaha/Council Bluffs, with a tri-weekly turn-around between Union and Lincoln. It also plans to run one train [569] tri-weekly between Kansas City and Topeka, with set-off and pick-up at Topeka. Extra trains will be run during the heavy grain traffic season. Applicants contend that the proposed operations are unrealistic and inefficient, and would interfere with their own operations. We conclude that the north-end trackage rights are operationally feasible, although MKT's operating plans may require some revision.

At present, MP operates four trains a day over its Kansas City-Omaha/Council Bluffs line. Further, two coal trains and two corresponding empty trains operate each week over the Kansas City-Nearman segment of this line. Numerous extra trains operate over the line during the heavy grain traffic season and CNW operates trains over the Leavenworth-Kansas City segment pursuant to trackage rights. MP contends that MKT's plan to operate between Kansas City and Omaha/Council Bluffs with one crew is unrealistic, especially when considering the services to be performed at Atchison and at Union. MP contends that these operations would take longer than the maximum hours of service for the train's crew. Therefore, the train would have to stop when the hours of service limit is reached and the MKT train would block the track until another crew could be brought to the train.

We agree that MKT's one-crew operating plan appears unrealistic. This is not an insurmountable problem, however. If MKT cannot perform the proposed operations using only one crew, then it should be able to revise its plan to provide for service using two crews, with the crew change occurring at an appropriate point between Kansas City and Omaha. Although operations using two

crews would be more costly than using one crew, such operations appear feasible and would prevent operating problems relating to hours of service laws.

Operations over UP's line between Kansas City and Topeka do not appear to present any serious operational problems. UP contends, however, that the proposed operations will cause congestion problems at Topeka. Under MKT's operating plan, track space at UP's Topeka yard would have to be used to store MKT trains awaiting pick-up. UP asserts that this reduction of yard capacity available for its own use would be a problem, particularly during the heavy grain traffic season.

The Kansas City-Topeka operations do not present any undue operating problems. Applicants' arguments relate more to the efficiency of the proposed operations than to their operational feasibility. UP does face some loss of yard capacity at Topeka available for its own use because of MKT's operations. MKT, however, will have to pay an adequate rental for the use of UP's facilities. Therefore, UP will be compensated for the reduction in its available yard track space.

[570] The benefits of the north-end trackage rights clearly outweigh any harm they might have to the consolidation. The trackage rights will give MKT the opportunity to be an effective competitor for traffic, primarily grain, originating at Omaha/Council Bluffs, Lincoln, Atchison, and Topeka. This will ameliorate the anticompetitive impacts of the UP-MP consolidation on the Omaha-Kansas City corridor, including foreclosure problems at Kansas City. Further, the trackage rights will pose no extraordinary operating problems for applicants. Applicants will face some reduction in the capacity of the facilities which is available for their use. MKT, however, will have to pay reasonable compensation for its use of applicants' facilities. Applicants should suffer little, if any, actual harm as a result of MKT's opera-

tions. Therefore, we will impose a grant of the north-end trackage rights as a condition to the UP-MP consolidation.

MKT's proposed south-end trackage rights are not appropriate public interest conditions. MKT faces no competitive harm from the consolidation at its south-end that will not be ameliorated by the north-end trackage rights. Further, with a grant of the north-end trackage rights only, MKT's essential services will not be harmed by the consolidation. MKT has available joint-line access to Corpus Christi and Laredo. MKT can, and does today, interchange traffic with SP at the Denison, TX, gateway for movement to Corpus Christi. At Corpus Christi, SP connects with TM for service to Laredo. MKT asserts that SP is not always interested in handling interline grain traffic over the Denison gateway and that two or three carrier hauls are not competitive with single system service. However, if the UP-MP transaction is consummated and if MP ceases to be a friendly connection for MKT, then MKT and SP will have greater incentives to cooperate on grain traffic. Further, TM is almost entirely dependent on interline traffic and, thus, has strong incentives to cooperate on efficient interline routings.

At present, about 80 percent of MKT's grain traffic to the Gulf terminates at Houston or Galveston, the ports it serves directly. The record shows that after consolidation, if MKT receives its north-end trackage rights, about 80 percent of its grain traffic would continue to move to Houston and Galveston. Therefore, MKT does not need the south-end trackage rights in order to offer competitive service on grain traffic and to make effective use of its north-end trackage rights. The anticompetitive impacts of the consolidation on north-south traffic between the Midwest and the Gulf States will be adequately addressed by a grant of the north-end trackage rights.

DOT argues that the south-end trackage rights should be approved in order to provide BN with a friendly connection to Corpus Christi and Laredo. We do not find this argument persuasive. If MP ceases to be a [571] friendly connection for BN, then BN, like MKT, will be able to interchange traffic with SP at Denison for termination, or for forwarding to TM, at Corpus Christi. Also, BN can reach the Gulf directly on its own lines and can interline traffic with SP and ATSF for export to Mexico via El Paso. Although El Paso handles a much smaller volume of traffic to Mexico than does Laredo, it is, nevertheless, a major gateway. BN has not sought relief relating to the loss of MP as a friendly connection on grain traffic and has not supported MKT's south-end trackage rights. BN apparently does not consider this to be a serious problem.

Further, even if we were to conclude that the south-end trackage rights proposals would redress anticompetitive problems, the south-end trackage rights should not be imposed because they pose serious operating problems at Laredo and Corpus Christi. MP's Laredo and Corpus Christi yards are both congested and MKT's proposed operations would severely disrupt MP's use of those yards. Traffic at Laredo is mostly export traffic moving to Mexico. This traffic must receive appropriate documentation and be cleared by customs before entering Mexico. Because of customs delays, MP needs a great deal of storage space at Laredo for cars waiting to be cleared for entry into Mexico. MP cannot reasonably set aside sufficient tracks at Laredo for MKT's proposed operations and still have sufficient track space available to conduct its own operations in an acceptable manner.

MKT's proposed operations would present even more severe problems for MP at Corpus Christi. Traffic at Corpus Christi consists mostly of import and export movements. The loading and unloading of oceangoing vessels in particular places a heavy strain on terminal

facilities. Hundreds of loaded cars may be required in a relatively short period of time for a single shiploading. Similarly, hundreds of empties may be required for offloading one ship. Often, all available track space in the yard must be used to store loaded and empty cars so they will be close at hand when needed. MKT operations in MP's Corpus Christi yard would seriously limit MP's ability to switch and to build trains, to classify cars, and to handle local and export business. Further, MKT has requested that two tracks over 4,000 feet in length be made available for MKT trains at MP's Viola yard at Corpus Christi. That yard includes only two tracks over 4,000 feet long and they would both have to be made available to MKT if its request for use of terminal facilities were granted.

MKT also argues that its requested conditions are needed to protect essential services. Our analysis of the traffic diversion evidence submitted by the parties (see Appendix F-8) shows that MKT faces gross revenue losses as a result of the primary transactions of about $18.8 million. MKT's own diversion estimate is $23.5 million. We have concluded that [572] MKT has not shown that it stands to lose any additional revenue because of the CNW settlement (see Appendix G). On the other hand, we have determined that MKT's north-end trackage rights will enable it to divert as much as $21.2 million in gross revenues.

We conclude that MKT's south-end trackage rights are not needed to ameliorate any competitive or essential service problems arising from the proposed transactions and that those trackage rights are not operationally feasible. Therefore, those requested trackage rights conditions will not be imposed.

DENVER & RIO GRANDE WESTERN

DRGW opposes the consolidation as harmful to competition through the central corridor, and seeks conditions specifically to mitigate competitive harms. DRGW

seeks trackage rights over the MP line between Pueblo, CO and Kansas City, independent ratemaking authority (IRA) over the WP, and certain traffic protective conditions.

(1) *Trackage Rights to Kansas City.* We have already recognized the harms to competition which will arise from the consolidation. DRGW's trackage rights request addresses the competitive consequences in the central corridor directly, with a minimal burden on the consolidated system. UP has withdrawn its opposition to the request. We will approve it.

The operation by DRGW of trackage rights over MP's 619 mile line between Pueblo, CO and Kansas City, will provide efficient rail transportation to the benefit of shippers. The greater portion of this line is without substantial grades and has a maximum authorized speed of 55 miles per hour. On this line, there are 47 sidings, of which 32 are over 1 mile in length. The longest siding is 12,260 feet.

In its proposed operating plan DRGW requests the right to interchange traffic with SSW at Herrington, KS and a limited right of interchange with MP at Geneseo, Gypsum, Lomax and Osawatomie, KS. Operational problems involved in the proposed interchanges are minimal.

The applicants in this proceeding anticipate a reduction of traffic on this line of 2.88 million gross tons or an 18.7 percent decrease in years three, four and five following consummation. Consequently, without the use of this line by another carrier, the level of service to shippers would deteriorate. With a carrier such as DRGW paying a portion of the costs associated with the maintenance and operations, the economic viability of this line will be maintained. The proposal does not present any operational problems. The line has considerable capacity to handle the traffic of the owners plus the six daily through trains of the DRGW.

[573] Along with the trackage rights proposal over MP, the DRGW has included a joint-facilities agreement with KCS and MILW for the use of their joint agency in Kansas City. This agreement provides for the use of the KCS-MILW joint agency services to deliver and receive loaded and empty freight cars on behalf of DRGW in interchange to and from connecting lines in Kansas City, consistent with the joint agency's regular interchange with those connecting lines, to make up outbound trains and to receive and switch out inbound trains for DRGW, to effect repairs to DRGW equipment, to service and repair locomotive power as needed, and to handle appropriate station accounting and clerical services incidential to the terminal operations.

The use of the KCS-MILW's East Kansas City Yard and Knoche Yard by DRGW will enable it to effect appropriate terminal operations with efficiency and economy. The movement of DRGW's traffic in the interchange runs of KCS-MILW will not create congestion in the greater terminal area. The operation of DRGW trains in and out of the Knoche-East Kansas City yards and the use of terminal trackage to Sheffield Junction will not present any significant operational problems for other carriers.

ATSF argues that we should not approve the DRGW trackage rights for several reasons: it will increase congestion at Kansas City; the Commission does not have the authority to impose trackage rights over the 12-mile segment of the line east of Pueblo; it will lessen competitive alternatives for DRGW captive shippers. We disagree with all three of ATSF's arguments.

As discussed above, DRGW's use of the KCS-MILW joint facility in Kansas City will provide an efficient interchange for DRGW traffic. The movement of DRGW traffic within the Kansas City terminal area will not add to congestion because this traffic will move in currently

operating transfer runs. Traffic to or from KCS and MILW in interchange with DRGW will not be moved from the joint facility to effect interchange. As to the DRGW trains entering or leaving Kansas City, they must cross the KCT main tracks at Sheffield Junction. The movement of trains through this interchange is controlled by the KCT, not by MP or DRGW. With control by a neutral party, no one rail carrier is likely to receive any preference in the movement of trains which would cause undue delay to another carrier.

In contrast to SP's main line trackage rights request, see discussion *infra*, DRGW will not deliver traffic to its connections in a less refined blocking pattern than exists today; DRGW has the facilities to pre-block any run-through train to Kansas City connections at its Pueblo Yard, where it makes up and assembles outbound MP trains.

[574] The 26 mile line segment between Pueblo Jct. and NA Jct., east of Pueblo, CO, is operated as joint trackage by MP and ATSF. For economic reasons, in 1967 they entered into an agreement to enable them to eliminate their parallel lines in the area. The Commission approved the proposal in 1968. The agreement states that Santa Fe proposed concurrently to obtain rights over DRGW at Pueblo Jct. to provide a connection for itself and its tenant (MP) to DRGW trackage west of Pueblo Jct., "that is in the DRGW-MP Pueblo Joint Terminal," and further that MP proposed to abandon a portion of its line near Pueblo and use Santa Fe and DRGW lines to a connection with MP-DRGW Joint Terminal trackage west of Pueblo Junction.

Santa Fe owns that portion of the line which extends est from Pueblo Jct. for about 12 miles to Nyberg. MP owns the 14 miles from Nyberg to NA Junction. The agreement provides that either party may permit another railroad to use the portion of the joint line

owned by it at any time (Section 15); however, "no assignment by the parties hereto of any interest or rights * * * separate * * * from an assignment, sale or lease of its entire railroad, shall be valid without the written consent of each party * * *." (Section 31)

We may require, under 49 U.S.C. 11103, that terminal facilities, including main line tracks for a reasonable distance outside of a terminal, be used by another rail carrier if the use is practicable and in the public interest without substantially impairing the ability of the owning carrier to handle its own business. We find that the 12 mile ATSF line segment is a terminal facility within the meaning of 49 U.S.C. 11103, and that we may require its use by DRGW.

In 1922, construing the newly amended section 3 (one of the predecessors to section 11103), the Commission stated that the Congress had "recognized that there is a broader interest than that of the individual carrier whose property rights happened to be involved, viz, that of the public. The object * * * was to make more flexible the use of existing terminal facilities * * * while the power * * * is to be exercised upon careful consideration of each situation * * *. [T]he interest of the public imposes important qualifications on the manner of use of the property employed in the carrier service," *Hastings Commercial Club* v. *C., M. & St. P. Ry. Co.*, 69 I.C.C. 489, 493 (1922).

In a later case, a 12 mile stretch of tracks was found to be a terminal facility and not more than a reasonable distance outside of the terminal at Peoria within the meaning of the Act, *Chicago & Alton R.R. Co.* v. *T.P. & W. Ry. Co.*, 146 I.C.C. 171 (1928). The case was decided on other grounds but the Commission did specifically find that it had the power under section 3(4) to require the use of the main-line tracks in question: [575]

"Whether the distance necessary to be traversed over the line 'entitled to the enjoyment of terminal facilities' is a reasonable distance is a question to be determined in the light of the facts in each case* * *" 146 I.C.C. at 179.

In *City of Milwaukee* v. *Chicago & N.W. Ry. Co.*, 283 I.C.C. 311, 314 (1951), the Commission citing cases stated that section 3(5) "is highly remedial and that the words 'terminal facilities' should be liberally, not narrowly, construed."

In examining the legislative history of one of the predecessors to 49 U.S.C. 11103, *Spokane, P. & S. Ry. Co. and Union P.R. Co.—Control*, 348 I.C.C. 109 (1975) (*Spokane*), the Commission found a policy against duplication of rail facilities. " 'If these facilities in very many places were jointly controlled and operated, great resultant waste would be avoided and economies would follow with added advantages to industries, to commerce, and the general public.' Hearings on H.R. 4378, House Committee on Interstate and Foreign Commerce, Vol. 2, p. 2319 (1919)," 548 I.C.C. at 142.

In the *Spokane* case, the Commission expressed concern that if rights under section 3(5) were not granted SP might be forced to build its own line in order to compete in the area at issue. "Such a development clearly would be contrary to the intention underlying section 3(5)," 348 I.C.C. at 143. The Commission noted that although it did not intend to change the manner in which the section was applied, an administrative agency has the discretion to "alter its past interpretation and overturn past administrative rulings and practice * * * [T]his kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency, *American Trucking* v. *AT&SFR Co.*, 389 U.S. 397, 416 (167)," *Id.*

Because "[t]he key is the use to be made of the track," *FEC Ry. Co.* v. *U.S.*, 256 F. Supp. 986, 989 (M.D. Fla. 1966) *aff'd* 386 U.S. 8 (1977), and the purpose behind a grant of trackage rights is to enable DRGW to exit and enter the Pueblo Terminal to and from the east, we find this use to be within the meaning of 49 U.S.C. 11103.

In order to impose trackage rights over terminal facilities, the use must be "practicable and in the public interest without substantially impairing the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business," 49 U.S.C. 11103(a).

The MP line between Pueblo and Kansas City has the capacity to handle easily the additional traffic for the account of DRGW. The joint trackage between Pueblo and NA Junction is a single track, centralized traffic control system on which trains can proceed on signal indications [576] and where switches are remotely controlled. The centralized traffic control system provides efficient operations in which delays in meeting and passing can be held to a minimum.

With the additional traffic of the DRGW on the joint line as proposed, we recognize that occasional delays will occur. These delays will vary to the extent that there are wide fluctuations in a carrier's daily operations.[113] The use of this track segment by three carriers will require coordination of operations between the parties. There is at present a considerable amount of trackage involved in joint operations between ATSF and DRGW in the Pueblo area and throughout Colorado which requires coordination and cooperation; we are certain that joint operation

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[113] We note that applicants estimate a decline of about 3 million gross ton miles of traffic per year over the line, while DRGW estimates an increase of 2.5 million gross ton miles. The result is a net decrease in traffic over the line.

between Pueblo and NA Junction involving the movement of DRGW trains will enjoy the same spirit of cooperation. MP plans to reduce the volume of traffic over the Pueblo to Kansas City line due to internal reroutings. The use by DRGW of the joint ATSF-MP track segment will not substantially impair the ability of ATSF to conduct its own business.

Because of the substantial public benefit the trackage rights between Pueblo and Kansas City will provide, by enhancing and stimulating competition in the central corridor while causing no significant operating problems for any of the carriers involved, we find that DRGW's trackage rights between Pueblo Jct. and Nyberg, an essential portion of the larger trackage rights, are justified under 49 U.S.C. 11103.[114]

As we have recognized in our discussion of competitive impacts, the consolidation will result in a reduction in competitive alternatives for some shippers through the central corridor. DOJ, DOT and California have noted this effect, and recommended that we grant DRGW's trackage rights request to mitigate this harm. Consolidation will result in common control of UP and MP's parallel routes in the central corridor, a loss of competition between the two, as well as a shift of traffic from the MP to the UP routes. Because of the loss to the DRGW of a neutral or friendly MP connection at Pueblo due to consolidation, shippers will lose the DRGW-MP competitive alternative to the UP that exists today for transcontinental traffic. DRGW will also lose WP as an independent connection between northern California and Utah. Consolidation thus results in a lessen-

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[114] If the Commission is required to set the terms of compensation for the terminal area trackage rights due to a failure of the parties to agree, we will apply the principles for compensation in condemnation proceedings, *Missouri K.T.R. Co.* v. *Kansas City Term. Ry. Co.*, 198 I.C.C. 4 (1933).

ing of competitive alternatives through the central corridor which can be mitigated by granting DRGW independent access to Kansas City.

[577] Granting trackage rights will enable DRGW to provide new competitive routes, rates and service, and will reduce market concentration on transcontinental traffic through the central corridor; DRGW shippers will benefit from direct DRGW service to the Kansas City gateway and the resulting reduction in interchanges to destination. Along with the SP interchanges at Ogden and Kansas City, DRGW will be positioned to attract Oregon and northern California traffic across its new central corridor route to the major gateways of Kansas City, for traffic to and from the Gulf, the northeast and the midwest, and St. Louis to eastern markets. DRGW estimates it will gain $40 million annually in gross revenues.

DRGW has persuaded us that it is an efficient and well-run railroad; it has the capacity to handle anticipated traffic gains to and from its Utah connections, and its central corridor routing will be competitive with UP routings.[115] It participates in 35 percent of the traffic interchanged at the Utah gateways today, in competition with UP's fast, efficient lines, and we are certain that it will prove itself capable of handling the traffic it expects to attract in an efficient and competitive fashion. DRGW, along with SP in the west and its Kansas City connections in the east, will provide an effective competitive alternative to the UP system in the central corridor.

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[115] SP alleges DRGW routings would not be competitive for time sensitive traffic. However SP, DRGW and BN instituted a TOFC service between Chicago and the Bay Area that as advertised would be competitive with UP routings. The record indicates this service did not always operate as scheduled. The proposed transaction will give these carriers incentives to improve the reliability of this service and thereby compete with UP for time sensitive traffic.

ATSF complains that DRGW's captive shippers will suffer from a loss in the number of competitive routings available to them today, and ATSF complains that it will lose traffic presently interchanged with DRGW.

We agree with DOT that the impact on competition as a whole due to the loss of alternative interline routings for DRGW captive shippers between Pueblo and Kansas City is small. DRGW shippers have not complained of that result; on the contrary, numerous DRGW shippers testified in support of the requested trackage rights.

ATSF is particularly concerned about the unit train coal movement it handles in interchange with DRGW to NIPSCO over ATSF's Pueblo to Kansas City line. As discussed in Appendix G, ATSF has enough influence over the receivers of the coal, who actually route the traffic, that it will continue to handle the traffic. ATSF will lose some traffic to DRGW's new route; we estimate the maximum gross revenue loss to be about $10.6 million, and the net loss to be about $1.7 million. ATSF has not made a showing that this loss, even combined with its loss [578] to the consolidated system, would harm its ability to provide essential services. DRGW's trackage rights will be significantly pro-competitive, because it will be in a position to provide competitive transcontinental service through the central corridor, and will add a competitor for all transcontinental traffic. We are confident that ATSF will respond in such a way as to increase rather than reduce competition.

We will grant DRGW's request for trackage rights over MP between Pueblo and Kansas City because it will ameliorate some of the competitive harms resulting from the consolidation, it is operationally feasible, and any harm it might cause to the consolidated system will be more than outweighed by the public benefit of added competition which it will produce.

(2) *Independent Ratemaking Authority.* DRGW has asked us to grant to it independent ratemaking authority over WP. The IRA, set out in Appendix D-2, would result in an automatic concurrence by WP for rates set by DRGW, while ensuring revenue to the UP system equal to that which it would receive based on existing divisional arrangements.

The IRA, along with trackage rights, would enable DRGW to set rates between northern California and Kansas City, while providing service between Utah and Kansas City. DRGW argues that the ratemaking authority, which it has substituted for its previously requested trackage rights over the WP system, is necessary to enable it to compete fully with the consolidated system, and redress the competitive harms resulting from consolidation. It argues that it would otherwise be foreclosed from participating in California traffic, because UP will favor WP, and SP will favor its long haul southern routes and/or arrive at a collusive accommodation with UP in Utah to share California traffic.

With the condition, DRGW would be able to maintain the existing rate situation at Utah junctions by independently setting rates over WP/DRGW; it could compete with the system by reducing rates, or responding to rate reductions set by the system, while guaranteeing the same revenues to the system which it would have gained had UP handled the traffic.

UP argues that the operation of the rate condition is uncertain, and that it would undermine competition by removing the incentive for DRGW to work cooperatively with its important western interchange partner, SP. DOT and California agree that the IRA would result in less incentive for a DRGW-SP interchange in Utah; California argues this will result in a further loss of competitive alternatives for California shippers, particularly those captive to SP. DOJ opposes all conditions but for DRGW's trackage rights.

[579] We agree that the IRA would tend to foreclose the SP from participating with DRGW in interchange at Ogden; DRWG would have a reduced incentive to work with SP if it could attract California traffic itself. SP, with its large gathering area in northern California, would also have less leverage over the merged system for rates and service because of its reduced ability to compete directly with UP by routing SP-DRGW.

Our grant of DRGW's Pueblo-Kansas City trackage rights, as well as SP's trackage rights between Kansas City and St. Louis (discussed, *infra*), will lessen rather than increase the likelihood of collusion between UP and SP, because direct competition between the carriers will exist both in the West and Midwest. (There are, in addition, both antitrust and regulatory remedies against the type of behavior DRGW predicts.) And assuming that the participating carriers respond in their own interest, these trackage rights will enhance competition by providing another alternative for shippers who prefer the central corridor. Use of the IRA may result in undesirable consequences for competition and for California shippers which we do not want to encourage. Because on balance it better serves the public interest to provide incentives for the central corridor carriers to develop competitive rate and service packages to attract shippers, rather than adding conditions to our approval of consolidations, we will deny DRGW's request for IRA.

(3) *Traffic Protective Conditions.* DRGW requested several traffic protective conditions similar to those requested by several other parties. (See discussion *infra*). Because such conditions are generally anticompetitive, and DRGW has failed to show any special circumstances justifying the conditions, we will deny DRGW's request for traffic protective conditions.

SOUTHERN PACIFIC

SP proposes four trackage rights conditions: (1) full service rights over UP between Ogden and Omaha/

Council Bluffs and between Gibbon, NE and Topeka, KS; (2) bridge rights over the lines described above (collectively, the "main line" rights); (3) bridge rights over MP between Kansas City and St. Louis; and (4) bridge rights over ATSF in the vicinity of Kansas City between Eton Junction and Congo [116] (collectively, the "MP" rights). SP also seeks traffic protective conditions.

[580] SP argues that its trackage rights over UP, MP and ATSF will maintain effective competition through the central corridor, help it to maintain essential services, ensure the continued operation of the SP-UP central corridor route on a competitive, nondiscriminatory basis, serve to avoid escalating rates, increase car supply and improve maintenance, not create operating problems for UP, MP, or ATSF, and not frustrate applicants' ability to obtain benefits from the consolidation. Additionally, SP argues that its full service main line rights will provide competitive alternatives to shippers captive to the new consolidated system in the central corridor, and that its MP Kansas City-St. Louis rights will preserve competition between St. Louis and southern California, allow SP to avoid the expenditure of funds necessary to up-

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[116] In F.D. 30,000 (Sub-No. 14) SP/SSW has requested full joint use of trackage rights over UP from Ogden to Council Bluffs and from Gibbon (a point between Ogden and Council Bluffs) to Topeka. SP/SSW obtained the Rock Island trackage rights over UP between Topeka and Kansas City in *Tucumcari*, 363 I.C.C. 319.

If granted, this application would provide SP/SSW with a route between Ogden and Council Bluffs, a distance of approximately 992 miles, and a route from Ogden to Kansas City, a distance of approximately 1,005 miles.

In F.D. 30,000 (Sub-No. 15) SP/SSW is requesting brige rights, in the alternative if full joint use trackage rights are denied, over UP between the same stations.

In F.D. 30,000 (Sub-Nos. 16 & 17) SSW is requesting trackage rights over MP between Kansas City and St. Louis, which involves a seven-mile line segment of ATSF in the vicinity of Kansas City. The total route, Ogden to St. Louis, over the primary applicants is 1,399 miles.

grade the former Rock Island line, and provide immediate service improvements and operating economies by allowing SP to shift traffic from its Corsicana line to its Tucumcari line.

We will grant SP's requested trackage rights between Kansas City and St. Louis, including a segment of line over ATSF, because SP's operation in this corridor will enhance competition in the central corridor and between the central and southern corridors for transcontinental traffic. This will also enable SP to avoid the expense of upgrading the recently obtained Rock Island line.

We will deny SP's request for main line trackage rights because it would impose a heavy burden on applicants and the public for operating reasons which would not be outweighed by any benefit to competition which might result.

(1) *Main Line Trackage Rights over UP.*

(a) *Proposal.* In the request for main line full joint service, SP proposes to operate three blocked trains in each direction between Ogden and Kearney, NE. At Kearney, some blocks will be exchanged, and two trains will operate in each direction daily between Kearney and Kansas City. In addition, on a twice-a-week basis, in each direction, local service will be provided between Westvaco, WY and Council Bluffs and also between Kearney and Kansas City. These local service trains will handle any overflow traffic that SP is unable to move on the blocked through service trains.

With full-service trackage rights, SP will compete for coal moving out of the Hanna/Rock Springs mining areas. By the third year of operation, [581] SP estimates it will move 190 unit coal trains per year out of this area. SP projects that 134 of these trains will operate via the Fremont/Council Bluffs gateway and 56 trains via the Kansas City gateway. Likewise, we must

anticipate the operation of 190 empty unit trains per year.

SP's application also includes the right to interchange with other carriers at Cheyenne, Grand Island, Fremont, Omaha and Council Bluffs.

Crew districts proposed by SP for the operation of its trains are at locations different than that of the UP. A comparison follows:

Proposed SP Crew Districts

Ogden to Westvaco	155 miles
Westvaco to Laramie	271 miles
Laramie to Julesburg	211 miles
Julesburg to Kearney	176 miles
Kearney to Council Bluffs	189 miles

UP Crew Districts

Salt Lake City to Green River	210 miles
Green River to Rawlins	134 miles
Rawlins to Cheyenne	182 miles
Cheyenne to North Platte	225 miles
North Platte to Grand Island	138 miles
Grand Island to Council Bluffs	146 miles

Dedicated tracks are needed for crew change purposes at Westvaco, Julesburg and Kearney. As proposed, these tracks would be 10,000 feet in length for trains in both directions at each location with the exception of Kearney where there is a need for one 7,000 foot westward siding and one 3,000 foot westward siding. In addition, SP projects the need of new yard tracks at Westvaco, Hanna, Laramie, Julesburg, Kearney and Council Bluffs. The responsibilities for ownership and maintenance of these facilities were not addressed by SP in its operating plan.

SP's operating plan for its main line bridge rights is basically the same as its full service operating plan ex-

cept that it reflects lower activity along UP's lines. Principal differences include operating only daily through trains between Ogden on the one hand and Kansas City and Council Bluffs on the other, dedicating tracks at fewer points and acquiring no additional equipment.

As discussed more fully in our competitive and essential services analyses, and Appendix F-9, SP argues that the UP-MP-WP consolidation will reduce competition and result in a downgrading of its service in the central corridor gathering area. As a result, SP argues that its trackage [582] rights over UP (and MP) are needed to allow it to maintain friendly relationships with western trunk lines and eastern carriers; establish new connections for movement through the central corridor; and provide central corridor shippers with alternative competitive service. In this latter regard, SP estimates a substantial number of shippers (shippers of 139,700 carloads in 1978) would receive improved rail transportation as a result of having new single line service and new competitive routings to and through the Missouri and Mississippi River gateways with its main line trackage rights.

(b) *Opposition.* Applicants, DRGW, and various labor organizations oppose SP's main line trackage rights. Applicants argue that SP's proposals are not justified by any public harm caused by consolidation, and that the rights are contrary to the public interest. In support of their position, applicants contend that the proposed consolidations pose no threat to SP's essential services due to SP's overstatement of its traffic losses and understatement of its ability to adapt to and counteract its losses. Similarly applicants contend that competition will not be reduced after consolidation because SP will remain a strong, viable competitor in northern California and Oregon due to the development of new sources of traffic, SP's significant routing influence over existing traffic from a large and sometimes exclusive rail net-

work, routing alternatives via DRGW through the central corridor and routing alternatives via its own lines through the southern corridor. In addition, applicants point to internal SP projections of continued growth as evidence that SP will remain a viable competitor. Applicants also contend that SP operations over UP will seriously disrupt UP main line operations, will not improve SP's interline service with UP, will not provide efficient service across the central corridor and would eliminate SP's incentive to work with DRGW.

The applicants contend that approval of SP main line trackage rights would result in a marked deterioration in the quality of rail service via the central corridor. Part of this deterioration would result from the fact that service offered by SP would be inferior to that provided by UP. The applicants express concern that SP's proposal will have an adverse impact on the quality of service on other railroads.

The applicants concern is based on the traffic as proposed to be handled by SP. As proposed in its operating plan, SP traffic would bypass the UP's North Platte yard and would not receive the quality of service UP provides.[117] UP contends that the inability of SP to provide preblocked [583] run-through trains to its connections will force the connecting lines to perform additional switching, not presently being done, in facilities that are not designed for this type of switching.

Likewise, the applicants expect that a deterioration of service would be experienced by remaining UP-SP traf-

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[117] For example, eastbound SP traffic for the CNW would be delivered in the Fremont-Omaha/Council Bluffs interchange in two blocks and would require further switching after being received by CNW; UP, on the other hand, provides numerous blocks for CNW locations and CNW connections, such as Conrail, B&O and GTW. SP would not provide blocked run-through trains to ICG or BN, so that this traffic would be handled in a less efficient manner than today.

fic routed via the Ogden gateway. SP's proposed schedules would not adequately replace the lost services that would otherwise be available over that route. Based on SP's traffic diversion study and operating plan, UP-SP run-through service would be reduced to only two or three trains per day, with each train carrying fewer blocks.[118]

With respect to SP's request for full service main line rights which would allow SP to serve local industries on the UP, SP's operating plan calls for local service to be provided between Ogden and Council Bluffs and between Gibbon and Kansas City. SP proposes that road switch engine crew assignments will be headquartered at Westvaco, Kearney, and Council Bluffs. SP's position is that the UP facility has the capacity to handle any SP train.

UP takes the position that any joint switching is unworkable, citing an example of soda ash plants in the Westvaco area in which the opportunity to switch the facilities is limited to certain hours of the day. With two separate entities attempting to switch plants at the same time, neither carrier would be able to adequately serve the shipper. In addition, UP holds that SP's operation of local train service over crew districts as long as 271 miles is not feasible in light of the hours of service law.

DRGW argues that SP's main line trackage rights will reduce competition by destroying DRGW as a competitor in the central corridor on transcontinental traffic, leave the central corridor under the control of SP and UP, and enhance SP's ability to bargain with UP over

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[118] For example, train BASV, a westbound expedited TOFC train, would no longer be justified as the limited remaining TOFC train, and would be mixed with manifest traffic resulting in longer transit time due to a slower operating speed. Other UP-SP run-through operations would likely be scrapped due to traffic diversions. The loss of any pre-blocked train to the SP would result in more switching by SP at locations not presently performing this function.

traffic and revenue allocation at Ogden. In support of its position, DRGW performed a traffic diversion study which showed it would suffer an annual gross revenue loss to SP of $17.8 million and an annual net revenue loss of $4.7 million. When combined with losses to the new UP system, DRGW estimates it will lose almost 40 percent of its pre-tax net income (1979 levels).

In response to DRGW, SP argues that its UP trackage rights are needed because SP's Tucumcari line is not a competitive alternative to central corridor routings on traffic originating at SP points in Oregon and northern California and DRGW's line is not competitive with UP for time-sensitive traffic between Ogden and Kansas City or between Ogden [584] and Chicago. SP also argues that DRGW has overstated its traffic losses and that DRGW will continue as a transcontinental carrier due to the loyalty of DRGW shippers and the ability of DRGW to market its service.

Various labor organizations oppose SP's trackage rights but argue that if they are granted, imposition of *New York Dock* protective conditions with certain modifications is needed to satisfy statutory requirements that carriers provide a fair arrangement for the protection of employees affected by the transaction (49 U.S.C. 11347). This issue is discussed, *infra*.

(c) *Conclusion.* We are denying SP's main line trackage rights because they are contrary to the public interest. While SP's trackage rights over UP would provide a single line alternative to the new UP system that theoretically could ameliorate reductions in competition in the central corridor, SP's operations over such a long main line segment would be significantly less efficient than UP's and would disrupt UP's operations. Reducing operating efficiency over UP's main line will downgrade service for central corridor shippers, which is con-

trary to the public interest.[119] The DRGW trackage rights, along with SP connections in Utah and Kansas City, provides a less burdensome competitive alternative to UP.

Although SP contends that its operating plan will provide efficient, effective transportation service and SP argues that UP has the capacity to handle any SP traffic without disruptions, we find UP's argument to be persuasive. It is not in the public interest to impose trackage rights that would clearly provide a service substantially inferior to that now being provided. SP's operating plan cannot provide transportation services comparable to that of the applicants in that the delivery of cars that require further switching to connecting lines will create congestion and delay not only to the traffic handled by SP, but also to other traffic of the connecting lines received from other sources. With respect to SP's request both for full service and bridge trackage rights, we find SP's operating plan to be unworkable in view of the hours of service law,[120] and SP's inability to provide adequate service to shippers and connecting railroads.

[585] (2) *Kansas City-St. Louis Trackage Rights over MP.*

(a) *Proposal.* SSW also seeks trackage rights over MP lines between St. Louis and Kansas City. This route

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[119] At oral argument, counsel for applicants stated that if SP's main line trackage rights were granted, applicants would not consummate the transaction. Such a consequence would be contrary to our general policy statement, *Railroad Consolidation Procedures*, 363 I.C.C. at 792, which requires that conditions not frustrate the ability of applicants to obtain the anticipated public benefits of consolidation.

[120] To perform local switching service between Westvaco and Laramie, with inherent delays in clearing through trains, SP's operating plan is not feasible in view of the hours of service law which prohibits crews from working in excess of 12 hours at a time.

includes 124 miles of centralized traffic control territory (CTC) between St. Louis and Jefferson City and two separate lines from Jefferson City to Kansas City. The River Subdivision is a 157-mile single track line including the ATSF 8 mile CTC segment, controlled by automatic block signals, with eleven principal sidings; the shortest is 5,810 feet in length. The Sedalia Subdivision is a 149-mile single track line, comprised of 116 miles controlled by automatic block signals and 34 miles of centralized traffic control territory. Generally, the sidings on the Sedalia Subdivision are not as long as the sidings on the River line. While the River Subdivision is without substantial grades, the Sedalia Subdivision has a 1.4 percent grade.

Amtrak operates 4 passenger trains daily between St. Louis and Kansas City using the Sedalia Subdivision. MP's trains to Memphis and North Little Rock, via the Carthage Subdivision of the Northern Division, use the Sedalia Subdivision between Kansas City and Pleasant Hill.

When MP trains move via the River Subdivision, they use an eight-mile track segment of the ATSF's Kansas City to Chicago main line between Eton Junction and Congo, a point within the switching limits of Kansas City.

SP proposes operating over both the River and Sedalia Subdivisions of the MP. In total, SP's operating plan projects the movement of eight trains daily over these lines. Local service would continue over SSW's lines between St. Louis and Owensville. SP proposes upgrading and using its line between Kansas City and Pleasant Hill, a distance of approximately 26 miles, if necessary to eliminate congestion. SP expects to move 13 million gross ton miles annually over these trackage rights, and no additional need for equipment is expected. Certain changes in train schedules, blocking patterns and classifications and yard assignments are proposed.

SP uses the same arguments to support its Kansas City-St. Louis trackage rights as were used to support the main line trackage rights. However, SP also argues that its MP rights will preserve competition between St. Louis and southern California by allowing it to provide competitive single line service between southern California and St. Louis via a route that is approximately 400 miles shorter than its existing SP-SSW route and by preventing MP from exercising control over the El Paso gateway similar to that which UP will be able to exercise at Ogden.

DOT and California support SP's requested trackage rights between Kansas City and St. Louis.[121] DOT argues that these rights in conjunction [586] with a grant of DRGW's trackage rights between Pueblo and Kansas City will ameliorate reductions in competition in the central corridor,[122] will help offset reductions of competition on the SP-El Paso-MP route between California and southwestern points and will allow SP to forego rehabilitating the former RI's Kansas City-St. Louis line (at an anticipated cost of $100 million). California argues that SP's MP rights will aid in developing new choices for SP captive shippers, maintain competition in the central corridor and provide an efficient use of railroad resources.

(b) *Opposition.* ATSF opposes SP's trackage rights over MP between Kansas City and St. Louis and over ATSF between Congo and Eton Junction on several grounds. ATSF argues that the Commission lacks juris-

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[121] DOT and California do not support SP's other trackage rights.

[122] DOT studied DRGW's capacity, and argues that SP-DRGW have the capacity to handle traffic which might be lost to WP-UP; on the highly time-sensitive traffic which SP originates or terminates, an incentive still exists for UP to participate with SP because WP is slower than SP and if their service is inferior, ATSF might capture the traffic.

diction to impose trackage rights over ATSF's Congo-Eton line because it is not a terminal facility within the meaning of 49 U.S.C. 11103; SP's proposed train operations do not meet the statutory requirements of 49 U.S.C. 11103 that they be practicable, not impair ATSF's ability to handle its business and be in the public interest, and SP's trackage rights do not satisfy the Commission's policy requiring that trackage rights imposed as conditions to consolidations be related to the impact of the consolidation and not pose unreasonable operating problems for the consolidating carrier. ATSF also argues that the record contains insufficient evidence to conclude that SP's trackage rights over MP's Sedalia Subdivision is in the public interest and that SP's application to operate over the Sedalia Subdivision is incomplete and should therefore be dismissed.

In support of its position, ATSF contends that SP's MP trackage rights will adversely affect ATSF's competitive ability by disrupting and delaying ATSF operations between Kansas City and Chicago and by increasing congestion and causing delays in the Kansas City terminal. In addition, ATSF contends that its Congo-Eton Junction line lies totally outside the Kansas City terminal area, is operated as part of ATSF's main line between Kansas City and Chicago totally separate from its Kansas City Terminal Division, and is not needed by any railroad to gain access to any yard or industry in the Kansas City terminal area.

(c) *Conclusion.* We are granting SP's trackage rights request over MP between Kansas City and St. Louis, both River and Sedalia Subdivisions, and over ATSF between Congo and Eton Junction because we find them consistent with the public interest.[123] We conclude that

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[123] We are approving SP's request over both the River and Sedalia Subdivision to provide the necessary operating flexibility to the carriers involved.

these rights, in [587] conjunction with DRGW's trackage rights between Pueblo and Kansas City, will offset reductions in competition for transcontinental traffic moving through the central corridor. While other potential connections exist for DRGW at Kansas City, the ability to coordinate service and institute service innovations is greater between two carriers, such as in a SP-DRGW-SP routing, than among three. We view SP's trackage rights as a necessary part of both central and southern corridor transcontinental routing 31 alternative to the new UP. We find that we have jurisdiction to impose trackage rights over ATSF, that MP and ATSF lines have adequate capacity to accommodate SP trains, and that SP operations will not present significant operating problems to MP, SP, or ATSF.

SP cites a 1977 DOT study of line capacity on various segments which concluded that the MP line between St. Louis and Jefferson City has a capacity of 190 million gross tons (MGT), and 89 MGT between Jefferson City and Kansas City. Applicants project traffic volumes after three years following consummation to be 40.7 MGT between St. Louis and Jefferson City and 30.1 MGT between Jefferson City and Kansas City.

With respect to the 8 mile Eton Junction to Congo segment of the ATSF Chicago to Kansas City main line, the 1977 DOT study concluded that this line had 183 MGT capacity. In the most extreme case, the record indicates the increased traffic of the applicants and the trackage rights along with traffic presently on the line will total 103 MGT annually. Clearly, the lines between Kansas City and St. Louis have adequate capacity to handle SP's traffic.

Concerning ATSF's line segment between Eton Junction and Congo, we have stated in our discussion of DRGW trackage rights, *supra*, that we have the authority to require terminal facilities to be used by another

carrier if the use is practicable and in the public interest without substantially impairing the owning carrier's ability to handle its own business, 49 U.S.C. 11103. We must first find the trackage at issue to be reasonably within a terminal area.

ATSF maintains that the 8 mile line segment between Congo and Eton Junction is an essential portion of its main line between Chicago and Kansas City, but is not necessary to access any part of the Kansas City terminal area.

However, an ICC ATSF tariff provides that the Kansas City MO/KS switching district includes all the territory beginning at the cement plant at Sugar Creek, MO on the tracks of the ATSF. The cement plant is on the eastern edge of Sugar Creek and the boundary lines bisect the ATSF tracks at approximately one-half the distance between Congo and Eton Junction. While Congo and Sugar Creek are within the limits of the Kansas City switching district, Eton Junction is outside the limits.

[588] The movement of trains through Eton Junction, however, is related to operations at Sugar Creek. The record shows that the main tracks between Sugar Creek and Eton Junction are used as points of interchange of a unit coal train between MP and ATSF. It is apparent that the main tracks from Sugar Creek to Eton Junction are within a reasonable distance of the Kansas City terminal area, and their use is related to terminal area activity.

As we have stated *supra*, there is sufficient capacity on both the MP and ATSF line segments over which SP seeks trackage rights. Granting SP access to both segments will not materially impair the operations of the involved carriers. This is not to say one carrier's trains will not from time to time delay the trains of another

carrier. The record indicates that SP currently operates as tenant or owner over trackage rights with the applicants on numerous line segments, including one segment of 255 miles with an average of 72 MGT per mile. We are certain that SP, ATSF and the applicants, in the interest of efficiency and operating economies, will coordinate operations through cooperative efforts, and that traditional operating philosophies and practices may be altered to achieve their mutual interests.

Because "[t]he key is the use to be made of the track," *FEC Ry. Co.* v. *U.S.*, 256 F. Supp. at 989, SP must use the 8 mile ATSF line segment to exist and enter the Kansas City terminal to and from the east as does MP, and the use is practicable and will tend to mitigate competitive harms of the consolidation, we will impose trackage rights on this ATSF segment under 49 U.S.C. 11103. If the carriers fail to agree on compensation terms, the Commission will apply the principles stated in our discussion of DRGW terminal rights, *supra.*

The SP trackage rights will serve the public interest by resulting in savings of rehabilitation funds, fuel savings (SP's Tucumcari route between southern California and St. Louis is 400 miles shorter than its Corsicana route), and the enhancement of competition for transcontinental traffic in general which we have found to be adversely affected by consolidation. Along with DRGW's trackage rights between Pueblo and Kansas City, SP should be able to provide excellent service for its captive California shippers, and a competitive alternative to UP for most central corridor shippers, in a manner which causes a minimal burden on applicants and other carriers.

As discussed in our section on essential service and our analysis of SP's spiral down theory (Appendix F-9), SP's ability to provide essential services is not significantly threatened by this consolidation to itself justify the imposition of conditions. We are granting SP's track-

age rights to mitigate competitive harms resulting from the consolidations, that is, [589] a reduction in rail competition in the central corridor and for transcontinental traffic in general.

SP provided no evidence in support of its request for traffic protective conditions; we will deny that request.

TRACKAGE RIGHTS COMPENSATION

Approval of the proposed transactions is conditioned upon the granting of the various trackage rights discussed above. We impose these trackage rights conditions in order to preserve the competitive balance in transportation markets where competition might otherwise be significantly lessened as a result of the consolidations.

No agreements have been reached between the parties regarding the trackage rights for which we have found a need. We prefer that the parties set the terms of their trackage rights agreements wherever possible, and then seek our approval as required, 49 U.S.C. 11343. In the event the parties should be unable to reach agreement, we will set the terms for the trackage rights.

The parties have presented widely divergent testimony regarding the proper methodology for determining trackage rights compensation terms. We have not adopted any particular formula for determining the reasonableness of a proposed rental for the use of a line of another carrier, and trackage rights in previous cases have been approved on varying bases. *Gulf M. & O. R. Co. Trackage Rights*, 282 I.C.C. 689, 693 (1952). In order to faciliate the negotiation of agreements, however, we will set forth the general principles regarding just and reasonable compensation for trackage rights imposed in consolidation proceedings. Although we will approve any reasonable terms agreed to by the parties, we will be guided by the following principles in setting trackage rights compensation absent a voluntary agreement.

The landlord railroad clearly is entitled to recover from the tenant full compensation for all variable costs incurred by the landlord as a result of the tenant's trackage rights operations. Further, the landlord should be entitled to recover an allocated share of its fixed costs relating to the involved trackage. We prefer that these costs be allocated on an actual use basis unless some other method is shown to be more equitable. In addition to recovery of costs, the landlord should receive rent for the use of its property. Rent should be based on an allocated share of return on value of the property. Valuation of the property should be the current fair market value, rather than book value or replacement value. Parties may determine rate of return on any reasonable basis. With respect to existing rail properties, absent new capital investment relating to the trackage rights operations, a rate of return based on current cost of capital or [590] opportunity cost may not be reasonable. In order to provide a realistic opportunity to compete, the trackage rights tenant should operate over the involved lines under economic conditions comparable to the landlord's. Therefore, the landlord's actual rate of return on the value of its rail properties should be given consideration in determining a just and reasonable rate of return.

Finally, in setting compensation terms absent voluntary agreement, we will consider the factor that these trackage rights are granted for the purpose of maintaining competitive balance where competition would otherwise be sigfinificantly lessened by the consolidations. Therefore, any terms so onerous to the tenant as to defeat the purpose of the trackage rights cannot be considered just and reasonable. *See Louisville & N. R. Co.-Merger-Monon Railroad,* 338 I.C.C. 134, 186 (1970).

If the parties cannot reach agreement, we will set the terms and conditions for the imposed trackage rights. In order to allow time for negotiations, petitions requesting determinations of terms may be filed no sooner than 60

days after the effective date of this decision. A petition seeking determination of trackage rights terms and conditions should set forth the petitioner's final offer with a full explanation thereof. A copy of the petitions shall be served on the opposing party. The opposing party shall file its reply, setting forth its final offer and a full explanation thereof, no later than 30 days after the date of service of the petition.

We will not require that trackage rights compensation terms be settled before the primary applicants are allowed to consummate the consolidations. However, immediately upon consummation of the consolidations, the imposed trackage rights will become effective and trackage rights tenants will have authority to commence operations. Compensation, which will accrue from the actual date of the start of trackage rights operations, will be payable after terms have been determined.

BURLINGTON NORTHERN

(1) *Trackage Rights and Rates Conditions.* BN seeks trackage rights and rate conditions relating to movements of coal from the PRB to utility plants served by MP. The trackage rights would give BN direct access to five power plants served exclusively by MP.[124] BN also seeks independent ratemaking authority permitting it to establish, without MP concurrence, joint BN/MP rates on coal moving from BN origins to MP destinations. This condition would also permit BN to set divisions between MP [591] and BN based on the ratio of the railroads' variable costs, using BN estimates of MP's costs. BN seeks these trackage rights and rate conditions contingent upon CNW entry into the PRB over the joint line and

[124] BN has filed applications for authority to conduct the proposed operations in Finance Docket No. 30,000 (Sub-Nos. 36, 37, 39, 40, and 41). These applications, respectively, seek authority to serve plants at Oologah, OK; Nearman, KS; Fort Gibson, OK; White Bluff, AR; and Newark, AR.

connector line. BN asserts that these conditions are necessary to protect the public from anticompetitive impacts of the transactions.

As discussed above, the proposed consolidations will not have a significant adverse impact on either ex ante or ex post competition for the transportation of coal. Because anticompetitive impacts on coal transportation have not been shown, we must consider BN's conditions under the standards we have enunciated for imposition of conditions to protect carrier, as set forth in *BN-Frisco,* 360 I.C.C. at 951. Under these criteria we will not impose conditions to protect a carrier unless essential services are affected.

Because BN proposed its coal conditions as public interest rather than carrier protective conditions, it has not argued that those conditions are necessary to prevent harm to esssential services. Further, we find no basis in the record for concluding that any essential services would be affected. BN is financially healthy and will continue to provide significant service transportating coal from the PRB. It serves more mines in the PRB than CNW will be able to reach over the joint line and will be able to serve many utilities directly and through interlining with carriers not affiliated with CNW or with the applicants. Therefore, we conclude that the proposed consolidations, considered in conjunction with CNW operations authorized in the *Connector Line* case, will not adversely affect BN's overall essential services or those related to the transportation of PRB coal. We will not impose BN's coal-related conditions.

(2) *Traffic Conditions.* BN seeks elimination of various traffic conditions imposed upon it in the *Northern Lines* case. These include standard DT&I traffic conditions and the so-called "Bieber" conditions.

BN filed a petition June 24, 1981 requesting that we reopen the *Northern Lines* case to remove DT&I condi-

tions imposed upon it there. A number of individuals filed comments and were interested in participating in that proceeding. The Commission recently issued a decision, *Traffic Protective Conditions*, 366 I.C.C. 112, eliminating standard DT&I conditions which had been imposed in most previous merger cases; this would include DT&I conditions imposed on BN in the *Northern Lines* case. The United States Court of Appeals for the Sixth Circuit has stayed our proceeding in *Traffic Protective Conditions* insofar as it addresses the removal of past traffic conditions, but has left in effect, pending judicial review, our decision not to impose standard DT&I conditions in future merger cases. Depending on the court's decision we may hear evidence on the usefulness of the DT&I conditions pursuant to a request by BN. [592] We will, however, consider the elimination of the Bieber conditions as requested by BN in connection with this proceeding.

The Bieber conditions were entered into by agreement of BN and WP and approved by the Commission in the *Northern Lines* case as a response to an agreement between BN and SP in that proceeding, 331 I.C.C. at 281-282. Briefly, the conditions tend to preserve WP's Bieber route between Bieber and Keddie, CA, by requiring that BN maintain rates over Bieber no less favorable than those offered over other routes for traffic between certain points, and to preferentially solicit for the Bieber. route. Conditions 7, and 9-18, 331 I.C.C. at 352-354.

The Bieber conditions were imposed in favor of WP at a time when it was a small, neutral interline carrier, and 20 percent of its total freight revenues were obtained from Bieber traffic. As a result of consolidation WP will no longer be dependent upon interchange with BN, SP or ATSF, but rather will be an integral part of a strong system which will compete with its former interline partners for a substantial amount of traffic. Practically speaking, the justification for the Bieber conditions will no longer exist after consolidation.

We have recognized, in our discussion of competition, *supra*, that an adverse competitive impact as a result of consolidation may occur in the West Coast north-south market. Continuing to require BN to hand off traffic to WP at Bieber, even if other routings may be more efficient, may limit BN's competitive response to the new system. By removing the conditions, BN, SP and DRGW are positioned to compete for the traffic which otherwise would go to the new UP system.

Of the railroad participants in the case, only applicants opposed removal of the conditions; at oral argument, counsel for applicants stated that they had no continuing objection to removal of the conditions. DOT took no substantive position on BN's request but stated that as a procedural matter the conditions should not be removed at this time but should remain in place until comments are solicited from the public on the proposal.

We see no need to conduct a separate proceedings on this matter. The conditions are being removed here in order to satisfy the public interest in ensuring that other railroads will have the opportunity to compete with the new UP system. In addition, BN requested elimination of the Bieber conditions early in the proceeding, thus providing notice that elimination of the conditions would be an issue in the proceeding. Under these circumstances, a separate proceeding is unnecessary. *See Missouri P. R.R. Co.* v. *United States*, 625 F.2d 178, 182 (*rehearing denied*, 625 F.2d 184 (8th Cir. 1980). Because of the changed circumstances which make WP a competitor rather than a neutral interchange partner with BN, and [593] because removal will ameliorate a potentially harmful competitive consequence of consolidation, we will grant BN's request that we remove conditions 7 and 9 through 18 to the *Northern Lines* case.[125]

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[125] In the alternative to specifically removing the conditions, we could have relieved BN from the obligation of continuing to comply with those conditions following consummation.

(3) *Home Road Condition.* Applicants intend to treat system equipment as a common fleet, but to retain separate UP, MP and WP car markings. Protestants argue that this will have the effect of requiring them to return empty cars over greater distances than if the home road condition were in effect, causing needless expense.

BN, DRGW and MKT request the following condition:

> Union Pacific, Missouri Pacific, and Western Pacific marked equipment shall be considered a common fleet and deemed home whenever delivered to any one of the three railroads comprising the unified system.

Protestants have failed to prove the extent of any alleged harm to them as a result of UP's proposed marking system.[126] UP argues that its efficiency could be substantially impaired if it were required to absorb empty back hauls when other railroads carry the loads and receive the revenues. Other consolidated systems (CSX, SP, BN, ATSF) maintain separate car markings for their railroad components and satisfactory arrangements are apparently worked out among railroads to avoid expenses of the sort hypothesized here.

The Commission is not in the business of regulating car service of the sort at issue here; railroad members of the Association of American Railroads have the ability to make necessary arrangements to avoid harmful consequences to each other. *See, Investigation of Adequacy of Freight Car Ownership*, 362 I.C.C. 844 (1980); *Norfolk Southern*, 366 I.C.C. at 239; *Guilford-D&H*, 366 I.C.C. at 417. We will not assert jurisdiction here over the matter.

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[126] In studying the effects of their equipment utilization plan, applicants have found that BN would be the only railroad which might experience an increase of empty car miles, and have stated their willingness to enter into a mutually beneficial arrangement with BN to avoid such an occurrence.

KANSAS CITY SOUTHERN

Proposed conditions. KCS seeks the imposition of various trackage rights, right-of-way purchase, and traffic protective conditions. The trackage rights would permit KCS to operate over MP lines between Texarkana, TX, and the St. Louis gateway; between New Orleans and DeQuincy, LA, via Lobdell, LA (with local access between Lobdell and New Orleans); between Beaumont and Galveston, TX, via Houston; and between Dallas and Fort Worth, TX, with local access. KCS seeks to [594] purchase segments of MP right-of-way over which it now conducts operations under trackage rights. These segments extend between Hamburg and Simmesport, LA, and between Lettsworth and Lobdell Junction, LA. It also proposes several traffic protective conditions aimed primarily at maintaining open gateways at Kansas City for the interchange of north-south traffic.

Competitive markets. KCS competes with MP for traffic moving between Kansas City and Gulf ports, between East Texas and Louisiana, between points in Texas, Louisiana, and Arkansas and the St. Louis gateway, and, further, it competes with MP on a source basis throughout the KCS service area. It asserts that its proposed trackage rights would enhance competition and be responsive to possible market power abuses by applicants in affected markets.

KCS has a direct route between Kansas City and the Gulf ports it serves. Important commodities moving in this corridor include export wheat, export corn, soda ash, and paper products.

KCS handles export wheat moving from Kansas City to Baton Rouge, Lake Charles, and New Orleans, LA, and Beaumont and Port Arthur, TX. KCS, however, does not have direct access to the wheat producing regions west, north, and east of Kansas City. Kansas is especially important as a wheat producer and KCS relies on

its connections at Kansas City, particularly UP and CNW, for access to export wheat origins.

KCS formerly received Iowa-origin export corn from the Rock Island. After termination of operations by the Rock Island, CNW began operations over Rock Island lines to Kansas City. CNW generally delivers Iowa corn traffic to MP at Kansas City or St. Louis.

Most of KCS's soda ash traffic originates in the Green River area of Wyoming. This traffic originates on UP lines and terminates at KCS's export facility at Port Arthur, TX. KCS fears that applicants will divert this traffic to Texas City or Houston/Galveston on MP's lines.

International Paper Company has several plants in Arkansas and Louisiana. Only MP offers rail service to all these plants. KCS is concerned that MP, because of its ability to serve all these plants, is in a superior bargaining position to offer International Paper contract rates that would effectively foreclose other carriers from participating in this traffic.

With respect to traffic moving between East Texas and Louisiana, and between the Southwest and the St. Louis gateway KCS has a more circuitous route than does MP, but does participate in the traffic. Important commodities moving in these corridors include paper, chemicals, chlorine, and plastics. KCS considers the paper traffic to be divertible because of applicants' superior ability to offer contract rates covering a very broad service area. Chemicals, chlorine, and plastics move mostly [595] between Texas and the South, via New Orleans. MP, SP, and KCS compete for this traffic. KCS, however, fears that it may not be able to maintain its market share because of the substantial circuity of its route as compared to those of MP and SP.

Arguments of KCS. KCS argues that imposition of its trackage rights and traffic protective conditions would be

responsive to alleged anticompetitive impacts of the consolidation. For example, KCS asserts that it will be better able to compete with MP for traffic from Kansas City to Gulf ports if it gets trackage rights enabling it to serve more ports. Service to a larger number of ports would increase KCS's ability to divert shipments in transit at shippers' request. This service is highly beneficial to grain shippers. Also, access to St. Louis will give KCS another connection with CNW and improve its opportunities for obtaining interline traffic from CNW.

KCS asserts that the markets for rail transportation services between East Texas and Louisiana and between the Southwest and the St. Louis gateway are now essentially MP monopolies or MP-SP duopolies. At present, KCS participates in these markets, but fears that it will lose some of its market share after consolidation of MP and UP.

At present, MP is the only railroad serving the region on the west bank of the Mississippi in Louisiana where KCS seeks trackage rights. KCS asserts that this region at present benefits from source competition. It argues that the consolidation would impair source competition now enjoyed by companies on the west bank because MP would provide favorable rates and service for traffic originating on UP and WP lines.

Arguments of DOT. DOT contends that KCS's proposed conditions would not ameliorate any anticompetitive impacts of the consolidation. It argues, therefore, that those conditions should not be imposed. We agree with DOT's analysis of KCS's proposals. The conditions proposed by KCS do not satisfy our criteria for public interest conditions and they will not be imposed.

Analysis of proposals. KCS's trackage rights proposals are aimed more at increasing current levels of competition than at ameliorating anticompetitive impacts of the merger. Public interest conditions, however, should be

imposed only in response to possible harms to the public interest arising from a consolidation, not to address competitive problems unrelated to the consolidation.

The proposed consolidations may reduce KCS's ability to compete for traffic originating in California and the Pacific Northwest. KCS, however, will continue to have available connections to these markets over lines other than applicants. Our approval of DRGW's requested trackage rights between Pueblo, CO, and Kansas City, will provide KCS with a [596] new connection through the central corridor giving it interline access to California and Oregon shippers served by SP.

KCS has overstated the amount of traffic it might lose to applicants because of market power diversions. (Appendix F-6) Many of the bases for diversion listed by KCS, such as greater ability to offer contract rates and to serve more points, are service advantages, not market power. The record does not show that the consolidations will significantly increase applicants' market power in the transportation markets where KCS seek trackage rights.

KCS's evidence and arguments submitted to show the benefits to be derived from its proposed conditions are irrelevant to our determination of need for public interest conditions. The evidence does not show any serious anticompetitive harms arising from the consolidations that would be reduced by KCS's proposed conditions. KCS, therefore, fails to prove an essential element of its case seeking the imposition of conditions.

At present, MP is the only railroad serving the west bank of the Mississippi between New Orleans and Lobdell. Consequently, MP already has significant influence over the traffic in that corridor which is not subject to intermodal competition. The proposed consolidations will not significantly enhance MP's market position.

The sought trackage rights between Texarkana and St. Louis also have not been shown to address any consolidation-related problem. KCS will continue to have available friendly connections to the St. Louis gateway after consolidation. Further, even if KCS would face foreclosure at Kansas City, the proposed trackage rights would not address the problem. Even with these trackage rights KCS would still be dependent upon other carriers serving origin points beyond St. Louis and Kansas City. Although the proposed trackage rights might improve KCS's *service* capabilities, KCS has not shown how improved service would help it prevent market power foreclosure at Kansas City. Rather, KCS has lumped service diversions together with market power diversions making its proposed conditions appear to be related to market power. If a carrier is confronted with market power foreclosure of access to a market, then it should seek trackage rights or other conditions that would preserve its access to that particular market. For example, MKT's northern end trackage rights proposals are the kind of conditions specifically tailored to meet a competitive problem arising from the consolidations. Those trackage rights will give MKT direct access to a market where there would otherwise be an anticompetitive impact of the consolidation. KCS, on the other hand, has sought conditions which would undoubtedly benefit KCS in its overall operations, but which would not redress any anticompetitive consequences of the consolidations.

[597] KCS has not shown that the consolidations would have an adverse impact on competition in the Dallas-Fort Worth market. That corridor is served by ATSF, MKT, BN, and SP. The consolidations will not reduce competition in the corridor and will not impair KCS's ability to reach Fort Worth through friendly connections.

The trackage rights between Beaumont and Galveston, via Houston, and between De Quincy and Lobdell will not ameliorate any anticompetitive impacts. At present, KCS

competes for traffic between East Texas and New Orleans. Its route, however, is very circuitous. The proposed consolidations will not give MP any market power advantages over KCS in this corridor. KCS's competitive disadvantages arise from its route structure, not from the proposed consolidations. Therefore, we will not impose conditions for the purpose of improving KCS's competitive posture in this corridor.

KCS's proposed right-of-way purchases have not been shown to relate to any consolidation impact. With respect to this proposed condition, the record shows little other than that KCS would like to purchase the involved property for less than fair market value.

No need exists for any of KCS's requested traffic protective conditions. KCS will continue to have available friendly connections for all traffic interlined at Kansas City, except for soda ash. With respect to soda ash traffic, KCS has counterbalancing leverage because the only Gulf Coast export facilities for soda ash are located on its line at Port Arthur, TX.

MILWAUKEE

Milwaukee originally sought 9 protective conditions. It has now withdrawn its condition 4 which concerns the use of yard facilities at Kansas City because DRGW, KCS and Milwaukee have recently entered an agreement concerning joint use of that yard. Milwaukee has also withdrawn its condition 9.

Conditions 1-3 relate to DRGW's trackage rights application between Pueblo and Kansas City. As noted previously, the DRGW application will be granted. Because Milwaukee's interest in preserving a neutral connection for through service at Kansas City has been satisfied, it is not necessary to consider these conditions further.

Conditions 5-7 are intended to require UP and MP to continue their current operating practices concerning

through routes and run-through trains. Milwaukee states that one of the reasons its traffic at Kansas City has increased is the success of its run-through train service with UP and MP. It fears that these carriers may refuse to participate after consolida- [598] tion. Milwaukee also has run-through service at Kansas City with MKT, Cotton Belt and Santa Fe. Milwaukee contends that this run through service provides essential competition to UP-MP.

Protestant, however, has not made a threshold showing that conditions (other than those relating to DRGW's trackage rights) would be appropriate to preserve essential services or to lessen any anticompetitive impacts of the consolidation. Milwaukee has not shown that any shippers along its routes will be deprived of service. The projected traffic diversion of $5.4 million in gross revenue should not be sufficient to threaten its operations. Further, as noted in our discussion of competition and of the trackage rights conditions we are granting, there will be several competitive routings at most major gateways.

Moreover, conditions 5-8 are similar to those we have found not to be in the public interest in recent cases. Milwaukee's attempt to maintain current service levels on run-through trains at Kansas City is similar to DT&I conditions 3 and 4 which order consolidating carriers to continue existing traffic and operating relationships. The conditions are slightly less onerous to the extent that run-through trains would be required only when the yard receives more than 70 cars a day. Nevertheless, current operating practices may prove inefficient in the face of changing traffic patterns. To require UP and MP to continue these practices if 70 cars are received regardless of other circumstances would needlessly limit their operational flexibility, would create inefficiencies, and would not be in the public interest.

Condition 8, which reflects the entire set of DT&I conditions, would be anticompetitive, and will not be imposed

for the reasons discussed in *Traffic Protective Conditions, supra.*

ILLINOIS CENTRAL GULF

ICG seeks a condition to preserve existing rates and routes at the Omaha/Council Bluffs and Kansas City gateways. It wants to be guaranteed the opportunity to participate in joint rates which match any rate reduction on new single line routes proposed by the consolidated carriers. ICG is especially interested in preserving traffic over its Omaha/Council Bluffs-Chicago and Kansas City-Chicago lines. ICG connects with UP and MP at Kansas City, and with MP at Chicago, East St. Louis, Memphis, TN, and New Orleans. Applicants' traffic study predicts a diversion of gross revenue of $9 million, while ICG predicts $11.3 million.

Applicants assert that they do not plan to close the routings now available to shippers over the various routings with which ICG is concerned. [599] ICG stated, however, that unless the consolidated carriers are required to maintain rate equality, these routes will not remain competitive.

ICG has not made the required showing that the consolidation, if not conditioned as it requests, will deprive shippers of essential service which it provides. ICG has not filed a brief, and has not argued that service over its affected lines will be discontinued; it only states that it will be less frequent. Nor has it shown that the conditions it proposes are necessary to reduce any anticompetitive effects of the consolidation. As explained in the section concerning competition, we think that the consolidation, as conditioned, will not unduly restrain competition.

ICG states that it will be placed at a disadvantage because it cannot change its joint rates unilaterally, without the consent of UP. Under 49 U.S.C. 10705a(a)(1)(A) a carrier may publish a surcharge increasing or decreas-

ing the through charge without the concurrence of its joint rate partners. This is one device ICG may use to preserve its joint rates.

Finally, ICG contends that it is unfair to subject it to merger protective conditions as a result of its past mergers while not subjecting applicants to similar conditions here. This is precisely the reason given in *Traffic Protective Conditions*, 366 I.C.C. at 131, for removing all DT&I type conditions imposed in prior mergers:

> . . . we see no public interest benefits in forcing already consolidated carriers to continue operating under DT&I Conditions while carriers that consolidate in the future will be free of the Conditions' rigid requirements.

Our decision here is consistent with our policy that, because protective conditions tend to be anticompetitive, we will not normally impose them.

KANSAS CITY BOARD OF TRADE

The Board of Trade of Kansas City seeks a condition to maintain all existing routes, gateways and channels of trade. The Board seeks to preserve all routings for grain shipments from Kansas and Nebraska origins to the Gulf Ports. The Board contends that rate equalization is necessary to give shippers the option of routes and thus a choice of carriers for service and car supply. This argument was recently rejected in *Traffic Protective Conditions*, 366 I.C.C. at 122-124, where we found that rate equalization such as the Board seeks is anticompetitive. Competition is enhanced not by keeping rates on competing routes at the same level but by allowing more efficient routes to reflect lower rates. *See also CSX*, 363 I.C.C. at 578, *Tucumcari*, 363 I.C.C. at 380-1, and *BN-Frisco*, 360 I.C.C. at 951. The Board has not shown any special circumstances such as would justify a departure from our usual policy of not imposing traffic protective conditions.

[600] CALIFORNIA

California requests conditions which (1) would make WP's tracks available for use by the National Railroad Passenger Corporation; and (2) would require that UP not operate over its line between San Bernardino and Los Angeles so as to adversely affect passenger train operations. Because California has failed to show any relationship between its requested conditions and any impact of consolidation, we will deny its request.

THE WATER TRANSPORT ASSOCIATION

The Water Transport Association (WTA) argues that two conditions must be imposed upon any approval of the proposed transaction. The first condition would require the consolidated UP system to provide the most efficient service required by the nature and volume of the traffic to or from water points on its route and to provide rates and service for water connecting rail service comparable, in relation to costs, to rates for similar, all rail service. The proposed condition would also require UP to refrain from undermining rail-water competition and coordination on their routes.

We will not impose this condition because it would be an unwarranted burden upon the consolidated system's ability to compete with water carriers. WTA has presented no evidence of specific competitive harm. It has only alleged that applicants will divert as much traffic as possible from water carriers to the new system's rail service. The fact that applicants will be a stronger competitor and able to divert traffic from water carriers is likely to be a procompetitive effect. The railroads' (and water carriers') ability to use the advantages inherent in their systems and modes of transportation to compete as best they can is preserved by 49 U.S.C. 10741(b). Applicants have stated their intention to maintain gateways with their water connections so long as this is economical, Cf. *Traffic Protective Conditions*, 366 I.C.C. 112. We

will not impose a condition which may blunt the consolidated system's ability to compete directly with water carriers as proposed by WTA.

WTA's second proposed condition would require the return to UPRR of all lands granted to UP to aid in the construction of the railroad,[127] and the use of the income produced by those assets in establishing rail rates applicable to rail-water traffic. While the use of railroad land grant[s] may be an area of some controversy, there is no effect on the land grant prop- [601] erties arising from this proposed consolidation. *See Railroad Consolidation Procedure*, 363 I.C.C. 783. Moreover, as discussed above, the enhanced ability of the consolidated system to compete with water carriers has not been shown to require a remedy such as the use of certain income to reduce rail-water rates. We will not impose the second condition proposed by WTA.

SETTLEMENT

Applicants have entered into settlements with CNW and CR.[128] We favor the negotiation of settlements by parties to a consolidation proceeding. Such agreements promote the expeditious resolution of matters of serious concern to affected carriers. When parties enter into a settlement they should submit a summary of this agreement to us so that we will be fully advised of all effects of our approval of a proposed consolidation. To the extent that the settlement terms involve only private contractual matters between the parties, however, we will not usually make those terms conditions of our approval of the transaction. *See CSX*, 363 I.C.C. at 581.

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[127] The nature of the UP land grants is more specifically discussed in the section of this decision dealing with the Pacific Railroad Acts.

[128] The terms of the settlements are set forth in Appendices C and D-1.

Criteria. We will review and specifically approve or disapprove settlement terms (rather than simply allow them to become effective as contractual matters without action on our part) in two circumstances. First, we will act on settlement terms providing for actions or operations, such as trackage rights or pooling, requiring our approval under the statute. Second, we may act on settlement terms which affect the public's interest in a sound and efficient national transportation system, and will approve them if they are consistent with the public interest and the terms require immunity from the antitrust laws or other laws in order to be implemented effectively.[129] Because our approval of settlement terms confers immunity from the operation of the antitrust laws, we will not indiscriminately approve any agreement reached by the parties. The CR settlement terms involve matters not requiring our approval, and will go into effect pursuant to the contract.

In evaluating settlement terms which we decide to act on, the public interest standard serves as our guide. We will approve terms if they are shown to be consistent with the public interest. Terms such as trackage right agreements must also satisfy the relevant statutory requirements for approval. Settlement terms, having been agreed to by the primary [602] applicants, need not satisfy our criteria for the imposition of involuntary conditions. *Norfolk Southern*, 366 I.C.C. at 240.

CNW. On December 15, 1980, CNW filed comments opposing the primary applications and seeking the imposition of various conditions. The proposed conditions included traffic conditions to protect the Chicago gateway and trackage rights over MP's Omaha/Council Bluffs-

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[129] In these circumstances, we will not determine whether settlement terms would in fact violate the antitrust law or other laws. We will act on stipulated terms if we conclude that possible action under the antitrust laws or other laws are likely to have a chilling effect on the operation of the settlement.

Kansas City line and over various other lines. Applicants and CNW filed the agreement ending CNW's opposition on July 8, 1981.

As discussed in the Competition section of this decision, UPRR is a major participant in the movement of transcontinental traffic and is the leading carrier in the central corridor. CNW is UPRR's primary interchange partner on transcontinental traffic moving between Western Territory and Official Territory. Of UPRR's traffic between points in States west of the Fremont and Omaha/Council Bluffs gateways and points in Official Territory in 1979, CNW participated in about 130,000 east-bound movements, or about 60 percent of the total east-bound traffic—including about 71 percent of the traffic moving via the Chicago gateway. West-bound, CNW participated in about 118,000 movements, or about 58 percent of the total west-bound movements—including about 71 percent of the traffic moving via the Chicago gateway.

CNW is concerned that unconditioned approval of the UP-MP consolidation could lead to significant diversions of traffic away from the UP-CNW route via Chicago to the UP-MP route via St. Louis. CNW estimates, on the basis of 1979 traffic, that 37,550 carloads would be diverted annually. This traffic diversion would reduce CNW's gross revenues by $25 million and its net revenues by $14 million. CNW's financial position has been improving in recent years, but it still is not a financially strong carrier and significant net revenue losses would have an adverse impact on the quality of service it is capable of providing.

Prior to entering into its settlement with CNW, UP argued that it would not shift a substantial amount of traffic away from the Chicago gateway to the St. Louis gateway because the Chicago route is an important service route demanded by shippers. Therefore, it estimated that gross revenue diversions from CNW would only be

about $8.6 million. Apparently because it recognizes the importance of maintaing the Chicago gateway, UP entered into a settlement with CNW which provides assurances tnat UPRR actions will not be unduly harmful to the competitive position of the UP-CNW route via Chicago relative to the UP-MP route via St. Louis.

The settlement contains three principal elements. First, the settlement includes an agreement to preserve the operating relationship between CNW and UP on traffic moving to, from, or through Chicago. Second, [603] the settlement includes various rate and service conditions designed to protect traffic moving by way of Chicago. Third, the settlement includes a pooling agreement regarding traffic between Omaha/Council Bluffs and Kansas City. These conditions are set forth in sections 3 through 5 of the settlement.[130]

(1) *Chicago Gateway Traffic*

In section 3, UP and CNW agree to work cooperatively to preserve existing traffic and operating relationships for traffic moving to, from, and through Chicago. The parties further agree to maintain UP-CNW run-through train service at least at the level provided as of May 1, 1981, as long as warranted by traffic volumn. The agreements included in section 3 do not contain any maximum time limitation on their effectiveness. Agreements to continue cooperative operations and to maintain run-through train service do not require our approval and do not raise any significant public interest issues. F.D No. 28499 (Sub-No. 1), *Norfolk & Western Railway Co. and Baltimore & Ohio Railroad Co.—Control—Detroit, Toledo & Ironton Railroad Co. (GTW-DTI Control)* (not

[130] The settlement also includes two other agreements of lesser importance. These relate to general cooperation between the parties and an amendment to CNW's trackage rights agreement to operate over MP's Leavenworth-Kansas City line. The terms of these sections are private contractual matters which pose no significant public interest problems and which do not require our approval.

printed), served May 13, 1982, at 7-8. Therefore, we will not take any action approving or disapproving section 3 of the settlement.

Section 4 contains four subsections relating to routes, rates, non-discrimination, and various operations and services. These agreements are to be effective for 5 years following consummation of the UP-MP consolidation. Subsection 4(a) provides that UP and MP will maintain and keep open all routes and channels of trade with CNW via existing junctions and gateways. Subsection 4(b) requires UP, on certain traffic, to maintain rates via CNW and the Fremont and Omaha/Council Bluffs gateways no higher or less favorable than UP-MP rates via St. Louis under specified conditions. Subsection 4(c) contains various provisions whereby UP agrees to provide non-discriminatory service handling CNW cars in order to preserve the quality of UP-CNW service via Fremont, Omaha, and Council Bluffs. Subsection 4(d) provides for continued blocking and interchange practices and maintenance of the level of run-through train services that existed as of May 1, 1981 (so long as warranted by traffic volume).

Subsections 4(c) and (d) involve operating agreements between UP, MP, and CNW which do not require our approval. Although these terms are similar to DT&I conditions 4 and 5, they are limited to protecting the efficient service route via Fremont and Omaha/Council Bluffs over CNW to Chicago for a 5-year period. These terms do not present signifi- [604] cant public interest problems and do not need antitrust immunity to be implemented, *GTW-DTI Control*, at 7-8. Therefore, we will take no action on those agreements. Subsections 4(a) and 4(b), however, contain terms similar to DT&I conditions which we have recently found to be anticompetitive and contrary to the public interest. *Traffic Protective Conditions*, 366 I.C.C. 112. Therefore, we will analyze those conditions carefully.

Subsection 4(a) requires the maintaining of open gateways for 5 years and is based on DT&I condition 1. DT&I condition I had been interpreted to require anticompetitive rate equalization. Applicants and CNW contend that they do not construe subsection 4(a) as requiring rate equalization. Rather, they view that condition as preventing outright cancellation of UP-CNW routings and drastic changes in rates or services that would effectively eliminate UP-CNW joint routes.

Open gateway conditions to railroad consolidations are not generally in the public interest. The provisions of 49 U.S.C. 10705 provide statutory protection against anticompetitive cancellations of through routes and joint rates. A condition that would require a level of protection for the maintenance of a gateway that is higher than is provided by statute might tend to preserve inefficient routings and to have a chilling effect on rate and service innovations by the new consolidated system. A condition that, on the other hand, would provide protection for efficient gateways to the same degree as the statutory protections is consistent with the public interest. Such a proposed condition, if agreed to by the parties, is not objectionable and will not be disapproved. However, this type of agreement should not be specifically approved as a condition either, because it would not require our approval in order to become effective.

Subsection 4(a) of the settlement, so long as it is interpreted as preventing actions that would unjustifiably close efficient gateways, is consistent with the public interest, but does not require our approval in order to be implemented effectively. The terms of that subsection are so general that they should not be specifically approved by us and, thus, immunized from the antitrust laws.

Subsection 4(b) provides that UP, at the request of CNW, will maintain tariff rates via CNW and the Fremont, Omaha, and Council Bluffs junctions between UP stations and interchanges west of the Missouri River (ex-

cept Kansas), on the one hand, and, on the other, points in Official Territory (except points in a described part of Illinois), no higher or less favorable than apply contemporaneously between the same points over UP and MP via St. Louis. This requirement does not apply if publication of the rate over CNW via Chicago would not preserve to UP a net contribution (total revenues less total variable costs) per rated unit of at [605] least 90 percent of the net contribution to UP and MP via St. Louis. UP, however, is bound by the requirement if CNW takes action (such as agreeing to an adjustment of divisions) that would enable UP to achieve 90 percent of the net contribution via St. Louis at the equalized CNW joint rate via Chicago.

In subsection 4(b), UPRR agrees to concur in joint rates with CNW via the Chicago gateway at levels competitive with any reduced UP-MP rates via St. Louis gateway under limited circumstances for a 5-year period. This type of arrangement involves a pricing agreement between competitors. The parties might not be able to implement it effectively unless it is immunized from the operation of the antitrust laws. The parties to the settlement state that they will adhere to its terms regardless of whether the terms are specifically approved as conditions to the consolidation. However, in view of the opposition to the settlement, they fear that their actions implementing the terms of the agreement could result in antitrust actions being brought against them. These actions could be costly and time-consuming to defend and could impair the implementation of the terms. They believe that this Commission, rather than the courts in antitrust proceedings, would present a superior forum for resolving any future issues involving implementation of the agreement terms.

We believe these arguments have merit with respect to the terms of subsection 4(b) of the settlement. An agreement which allows one business to compel another busi-

iness to set an equal price on competing services appears, on its face, to constitute a form of price fixing. As discussed below, we conclude that subsection 4(b) will not be anticompetitive. Therefore, the public interest will be served by approving that section of the settlement so that the parties may implement it without fear of legal actions being taken against them.

As previously stated, settlement terms requiring our approval in order to be implemented effectively will be approved if they are consistent with the public interest. In making this determination we employ a balancing test and weigh the public benefits against the public harms possibly arising from approval of the terms.

Our approval of a rate agreement which is related to a railroad consolidation immunizes that agreement from the antitrust laws and all other law. 49 U.S.C. 11341. A joint or collective rate agreement which is not part of consolidation requires our approval under 49 U.S.C. 10706. That section of the Act provides for approval only if the agreement will further the rail transportation policy of 49 U.S.C. 10101a. The terms of the UP-CNW settlement will become effective only upon consummation of the consolidation and they are designed to ameliorate adverse impacts to the UP-CNW operating relationships as a result of the consolidation. [606] Therefore, the terms of the UP-CNW settlement are part of the proposed consolidation and, to the extent approved, are immune from all other law. However, our policies for considering rate agreements in consolidation proceedings should be in accord, to the extent applicable, with our policy regarding approval of rate agreements under section 10706, especially when it is unclear whether the rate agreement is necessary to the consolidation and is entered into privately. Under that section, our standard of review is (1) whether the proposed agreement would enhance one or more of the transportation goals set forth in 49 U.S.C. 10101a, (2) whether the advantages of the agreement override other

considerations such as the anticompetitive nature of the agreement, and (3) whether the agreement is necessary or whether the objectives of the parties could be accomplished instead by other means. *Lower Lakes Coal Demurrage-Agreement*, 359 I.C.C. 363, 368 (1978). We will give consideration to these factors in determining whether subsection 4(b) is consistent with the public interest.

Because subsection 4(b) is similar to certain DT&I traffic conditions, we will first examine the terms of that subsection in light of our decision in *Traffic Protective Conditions*.

In *Traffic Protective Conditions* we identified six reasons for eliminating DT&I conditions generally. We will analyze the proposed rate condition in subsection 4(b) in relation to those six grounds in determining whether that condition will be consistent with the public interest.

We wish to stress, however, that in *Traffic Protective Conditions* we specifically left the door open for consideration of whether narrowly focused agreements or conditions could be approved or imposed in particular circumstances. 366 I.C.C. at 133. We left that door open because we believed that DT&I-type conditions could be consistent with the public interest if they were designed to deal with a specific problem and if their anticompetitive effects were shown in particular cases to be outweighed by other public interest considerations. Indeed, in recognition of the fact that specific and narrowly focused conditions can be consistent with the public interest, we left intact all of the individual conditions and agreements developed in prior cases. 366 I.C.C. at 116, n.9. Thus, what we essentially found wrong with the DT&I conditions in *Traffic Protective Conditions* was their entirely indiscriminate and blanket effect, which was exacerbated by the fact that they had often been imposed routinely as a matter of policy, and by the fact that they had, in many cases, been in effect for decades without any review of whether they remained consistent with the public in-

terest as defined by recent rail legislation. It was these factors that caused us to conclude that the DT&I Conditions are anticompetitive and inconsistent with the law as it stands today.

[607] Here, as was the case in *Norfolk Southern*, where we approved a narrowly focused agreement ensuring continued availability of the clearly efficient DT&I joint route (366 I.C.C. at 240-44) we are approving a narrowly focused agreement that differs significantly from the standard DT&I conditions. The CNW agreement (1) applies only to a few specified gateways; (2) applies to a route we have found to be efficient; (3) contains a special revenue provision to ensure that UP-MP is not deterred from lowering its single system rate via St. Louis by the prospect of having to participate in a rate via Chicago that would not be adequately compensatory, and (4) is limited to five years. Accordingly, we see no conflict between *Traffic Protective Conditions* and our approval of narrowly drawn conditions similar in some respects to DT&I conditions here and in *Norfolk Southern*. Rather, we see these two instances as examples of the narrowly drawn conditions we indicated we would be willing to continue to consider in *Traffic Protective Conditions*.

Against this background, we will now analyze the agreement in light of the six factors we cited in *Traffic Protective Conditions*.

(1) DT&I Conditions are contrary to the Congressional policy of fostering intermodal competition.

Subsection 4(b) will not have a detrimental impact on intermodal competition. The condition does not restrict UP and MP from adjusting their rates via St. Louis in order to compete effectively with other modes. Subsection 4(b) does not give CNW a veto power over reduction of rates on routes via St. Louis. The condition only gives CNW the power to require UP to offer a matching rate on its joint route via Chicago in specified circumstances.

Further, the condition provides protection for the net revenue contribution to UP on the equalized rates over the Chicago gateway. The net contribution requirement of the condition assures that UP and MP will not face a situation of having to offer a noncompensatory or unprofitable rate via Chicago in order to preserve equality with lowered rates via St. Louis. Therefore, the Chicago rate requirement should not deter UP and MP from offering rates via St. Louis which are competitive with the rates of other modes. In this important respect, subsection 4(b) differs from the standard DT&I conditions, which rigidly require rate equalization regardless of whether the single system carrier can profitably render service over the joint route at a rate equal to the reduced single-line rate.

(2) The Conditions remove incentives for efficient operations by keeping carriers from pricing more efficient routes at lower rates.

The proposed rate condition does not prevent or deter carriers from offering lower rates over more efficient routes. As discussed above, UP and MP will be free to reduce rates via St. Louis under the terms of subsec- [608] tion 4(b). The rate condition merely enables CNW to require competitive rates via Chicago if certain net revenue contribution requirements would be satisfied by the new rate. With respect to traffic for which the St. Louis gateway is more efficient than the Chicago gateway, it is not likely that the net contribution requirement would be satisfied unless CNW agrees to an adjustment of its rate division with UP. In such circumstances, CNW might be able to make a division adjustment that would satisfy the net contribution requirement. However, where the St. Louis route is significantly more efficient than the Chicago route, the necessary division adjustment under subsection 4(b) would likely be prohibitive and CNW would probably forego demanding rate equalization by UP. If UP-MP offer a rate only slightly lower than the rate via

Chicago for traffic moving more efficiently via St. Louis, CNW could compete and match that rate by imposing a negative surcharge on the Chicago route, rather than invoking subsection 4(b). Because of the net revenue contribution requirement, it probably would not be economically feasible for CNW to invoke subsection 4(b) to require a competitive rate on traffic for which the route via St. Louis is significantly more efficient.[131] Therefore, the condition will not prevent UP and MP from offering a lower rate over the St. Louis gateway than over the Chicago gateway in circumstances where the St. Louis gateway is more efficient.

(3) The Conditions encourage unnecessary utilization of resources as carriers are forced to offer special services, instead of lower prices, to attract new business.

As discussed above, subsection 4(b), with its special 90-percent revenue provision, preserves UP-MP's incentive to compete by lowering its rates to reflect potential lower costs on movements via St. Louis. Because that incentive will survive, the agreement is far less likely than the standard DT&I conditions to force carriers to compete only with services, instead of prices.

(4) The Conditions hamper carrier efforts to rationalize their systems by freezing existing junctions and interchanges.

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[131] Indeed, it appears unlikely that the agreement could require UP to preserve competitive rates over Chicago in circumstances where the St. Louis route is more efficient than the Chicago route. Under the agreement, UP's net contribution via St. Louis includes both its own contribution for service west of Kansas City and the net contribution obtained by MP for service between that Missouri River gateway and the Mississippi River gateway at St. Louis. UP's contribution via Chicago, in contrast, includes only its own contribution for service west of the Missouri River gateways of Fremont/Omaha/Council Bluffs. As a result, UP's net contribution via Chicago can drop below 90 percent of its net contribution via St. Louis even in circumstances where the Chicago route is more efficient than the St. Louis route.

Subsection 4(b) only applies to the Fremont and Omaha/Council Bluffs interchanges for traffic moving via Chicago. The UP-CNW route is an efficient service route for a large volume of traffic moving between points in Official Territory and the West. The rate agreement will help [609] preserve the competitive position of this route with respect to traffic for which it is efficient. The condition will not unduly protect inefficient routings, junctions, or interchanges.

(5) The Conditions stifle the ability of rail carriers to meet motor and water competition by allowing connecting rail carriers to block rate reductions.

As discussed, subsection 4(b) does not empower CNW to block any UP-MP rate reductions. Further, CNW's rights under the rate condition should not deter UP and MP from offering lower rates via St. Louis to meet intermodal competition.

(6) Existing statutory authority provides sufficient protection.

In many cases, CNW's authority to impose a negative surcharge under 49 U.S.C. 10705a may provide a superior method for maintaining competitive rates for the Chicago gateway with the UP-MP route via St. Louis. However, subsection 4(b) enables CNW to obtain a competitive rate with less financial burden than would be imposed by a negative surcharge for traffic which moves as efficiently via Chicago as it would via St. Louis. Moreover, for the most part, the operation of the agreement will reflect CNW's rights under section 10705 to compel competitive rates on competitive routes.

With respect to our section 10706 criteria, we conclude that the terms of subsection 4(b) will further the rail transportation policy of 49 U.S.C. 10101a and will provide public benefits outweighing any public harms. Further, as previously discussed, approval of subsection 4(b)

is reasonably necessary to its effective implementation. In the foregoing discussion, we have noted that subsection 4(b) will preserve price competition between transcontinental routes via Chicago and via St. Louis. In the absence of this agreement, UP could (pending litigation) foreclose CNW from competing with UP and MP on transcontinental traffic by refusing to agree to participate in joint rates via Chicago set at levels competitive with reduced UP-MP rates via St. Louis. Subsection 4(b), therefore, appears to promote intramodal competition.

On the other hand, the agreement may, in rare circumstances, protect inefficient routings. This potential harm, however, is not substantial because of the 90 percent net contribution requirement, as previously noted in our discussion of the second factor of *Traffic Protective Conditions, supra.*

We conclude that the subsection 4(b) rate agreement is consistent with the public interest and should be approved as part of the primary transaction.

[610] (2) *Pooling Agreement*

General. Section 5 of the settlement provides for pooling of train service between Omaha/Council Bluffs and Kansas City over MP's line. MP and CNW have filed an application under 49 U.S.C. 11342 for approval of the pooling agreement. The agreement provides that MP will handle separate CNW trains in pool service between Omaha/Council Bluffs and Kansas City. Only CNW trains consisting of freight originating or terminating at CNW stations in western Iowa, Minnesota, South Dakota, North Dakota, Nebraska, and Wyoming (excluding coal originating in Wyoming) shall be handled by MP. CNW will provide motive equipment and cabooses for the trains and the cars will remain in CNW's account. The trains will move between CNW's Council Bluffs and Kansas City yards and all work assembling the trains will be done by CNW. MP will provide train and engine crews for the

line haul movement. One train a day will move each way between Council Bluffs and Kansas City in pool service and extra trains will be operated on an as-needed basis. CNW will reimburse MP for all direct and indirect costs of handling the pool trains and pay MP an annual fee of $750,000. If approved, the pooling agreement will be in effect for a period of 15 years after the effective date of the UP-MP consolidation and thereafter will be subject to termination by CNW upon two years written notice.

CNW has a line between Council Bluffs and Kansas City, via Des Moines. This line, however, is quite circuitous relative to MP's line for traffic in the territory covered by the pooling agreement.

CNW estimates that 42,187 empty and loaded cars will move to and from Kansas City annually in pool service, based on 1979 traffic figures. Most of this traffic—20,728 loaded and 16,572 empty cars—will be shifted from CNW's existing route via Des Moines. The remaining pool traffic, 2,600 loaded and 2,287 empty cars, will be diverted from UP and MP.

The pool service will provide a substantially more efficient and economical route for traffic moving to and from points in the involved service area than does the existing CNW route via Des Moines. CNW's route between Council Bluffs and Kansas City is 391.2 miles long and operating time over it is about 36 hours. The pool route is about 200 miles shorter and should have an operating time of about 10 hours. CNW estimates that it will realize gross cost savings of $6.3 million annually as a result of the pool operations and should also realize $1 million in gross revenues from diverted traffic. It estimates the cost of the pool service to be $4.5 million annually, including the $750,000 fixed fee. It further estimates that the pooling operations will result in decreased fuel consumption of 1.2 million gallons annually.

[611] *Due Process.* KCS asserts that it was denied due process with respect to the proceedings regarding the CNW settlement. KCS contends that it was not afforded adequate notice regarding the settlement and that it was deprived of a fair opportunity to be heard because of improperly denied discovery requests and inadequate cross-examination opportunities.

With respect to notice, KCS contends that the pooling agreement changed the nature of the proposed transaction to KCS's detriment. It argues, therefore, that the original notice of the primary transactions and notice of the responsive applications of protestants, upon which KCS relied in formulating its own request for relief, were inadequate and, therefore, that it should have been given an opportunity to amend its requests for relief.

KCS's notice arguments have no merit. The pooling agreement does not differ materially from the trackage rights formerly sought by CNW between Council Bluffs and Kansas City, insofar as CNW's interline relationship with other carriers at Kansas City is concerned. The settlement agreement did not broaden the scope of these proceedings to the detriment of KCS or any other potentially affected member of the public. KCS had adequate notice of the settlement and was given an opportunity to comment and to be heard. It was not entitled to an opportunity to seek any further relief because of the settlement.

KCS also asserts that it has been denied due process with respect to its discovery efforts and cross-examination regarding the CNW settlement. It contends that during the proceedings it was improperly denied access to relevant information that would have supported its allegations that the settlement is not consistent with the public interest. These assertions are without merit.

KCS served interrogatories and requests for documents on CNW (KCS-36) and on UP and MP (KCS-37) seek-

ing information regarding the CNW settlement and various other matters relating to relations between CNW and the primary applicants. CNW and applicant responded to these interrogatories and document requests (CNW-31 and UP-MP-WP 106) providing much of the requested information. CNW and primary applicants totally or partially objected to some questions on the grounds that they were irrelevant to any issue in these proceedings or were vague or otherwise unduly burdensome to answer. CNW and applicants also raised various claims of privilege with respect to some interrogatories and requests.

KCS filed motions to compel, seeking further responses from applicants and CNW (KCS-38, KCS-41, and KCS-43). Judge Cross concluded in a decision served October 2, 1981 that applicants and CNW reasonably responded to all interrogatories and to the non-specific requests for addi- [612] tional documents, and that further studies or searches by them for KCS would have been unduly burdensome.

KCS appealed the Judge's denial of its motions (KCS-49). By decision served November 2, 1981, Division 2 dismissed the appeal as not satisfying the requirements of Rule 85 (49 CFR 1100.85) regarding interlocutory appeals.

KCS has renewed its appeal on brief. Upon review of these issues, we conclude that the Judge correctly decided all material questions regarding discovery and cross-examination raised by KCS. Further, we concur with the dicta in the decision by Division 2 regarding the failure of KCS to state specifically why applicants' and CNW's responses were inadequate. It appears that KCS simply did not like the answers it received. This is hardly sufficient to justify compelling further answers, much less to raise due process questions.

CNW and the applicants reasonably responded to KCS's interrogatories and requests. To the extent that

CNW and applicants failed to respond to KCS's questions and requests, those questions and requests do not appear to be reasonably calculated to elicit relevant evidence. Those questions are vague, unduly burdensome, or not directed at any matter having any appreciable bearing on the issues presented in these proceedings.

Various privileges have been claimed with respect to some of the unanswered questions and requests. We need not address the issues relating to these claims of privilege because we have concluded that KCS has received adequate responses to all relevant questions and requests. Further, our conclusion moots the issues raised by KCS's various interrogatories (KCS-42 and KCS-44) which were served on applicants and CNW to determine whether the asserted privileges were properly claimed.

With regard to the unanswered questions and document requests relating to the settlement negotiation process, we agree with CNW and applicants that this information is not relevant to the public interest issues in these proceedings. In any event, considering the very substantial record developed with respect to the settlement, we are persuaded that no material issues have been inadequately addressed because of any unanswered questions or requests. KCS's questions regarding the settlement negotiations are apparently designated to support is control allegations. Answers to those questions could not have reasonably supported credible arguments that UP has, or will obtain, control of CNW. The details of the negotiation process might show that UP and MP had a significantly stronger bargaining position than did CNW and that applicants got more out of the settlement than did CNW. As discussed below, [613] however, a superior bargaining position does not constitute control. Also, insofar as the settlement is concerned, we consider whether the agreed terms are consistent with the public interest. We are not concerned with whether terms that

may have been proposed and negotiated, but which were not agreed to, would have been in the public interest.

KCS presented several questions regarding coal traffic and the relations between CNW and UP regarding Powder River Basin coal. CNW's access to the Powder River Basin and its relationship with UP with respect to Powder River Basin coal have been the subjects of other proceedings before us and have been extensively analyzed. Also, the cumulative impact of the UP-MP consolidation and CNW access to the Powder River Basin have been thoroughly considered in these proceedings in our analysis of impacts on competition.

KCS has also asked questions regarding possible future abandonments of CNW's lines or of CNW's trackage rights over MP lines. Any future abandonments, however, would require our prior approval. No need exists to examine the public interest impacts of such potential abandonments here.

KCS also asked CNW and applicants to respond to a variety of hypothetical questions. Answering these questions would require speculation as to what applicants and CNW would do if we were to modify various terms of the settlement agreement in ways no party has proposed. These vague hypotheticals could be answered only in terms so speculative and general as to be of no practical value. Applicant and CNW correctly concluded that no reasonable response could be made to those questions.

Nothing set forth in KCS's motions to compel, appeal, or briefs gives any indication that any relevant, material facts were not developed because of any inadequate opportunities for KCS to conduct discovery or cross-examination.[132]

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[132] On brief, KCS has renewed its motion to strike the testimony of CNW's witness Duerinck. KCS contends that assertion of the attorney-client privilege prevented effective cross-examination of

Unauthorized control. KCS has raised various allegations of unauthorized control with respect to the pooling agreement and the terms of the settlement generally. KCS asserts that the operations covered by section 5 of the agreement are not pooling within the meaning of 49 U.S.C. 11342, but rather are subject to our jurisdiction under 49 U.S.C. 11343. It argues that section 5 is an agency agreement providing [614] for the operation of one carrier's property by another or for the acquisition or joint use of a railroad line by two carriers. KCS further contends that UP, if not already exercising effective control of CNW, will acquire de facto control of CNW as a result of the UP-MP consolidation and the operation of the terms of the settlement agreement. None of these arguments has any merit.

The pool operations do not constitute MP operation of CNW property under 49 U.S.C. 11343. Rather, MP will provide crews to operate CNW trains, moving traffic on CNW's account. MP will not have any authority to operate the trains for its own benefit or to exercise managerial control over the operations. Further, the movement of pool trains over MP line does not constitute joint use of the line within the meaning of 49 U.S.C. 11343. The proposed operations will be a train service pool in which MP crews operate both CNW and MP trains over the MP Council Bluffs-Kansas City line. CNW only acquires the right to have certain of its traffic move over the involved line in pooled service.

Neither the present UP-CNW operating relationship, the proposed UP-MP consolidation, nor the CNW settle-

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Mr. Duerinck, who served as counsel for CNW as well as appearing as a witness. KCS further contends that proffering Mr. Duerinck constituted a waiver with the respect to KCS's discovery requests. KCS's questions regarding settlement negotiations do not bear materially on any relevant issues. Therefore, KCS was not foreclosed from examining Mr. Duerinck on any relevant matters, and we need not determine whether Mr. Duerinck's testimony constituted a waiver of the attorney-client privilege.

ment give UP power to exercise control over CNW requiring our approval. In *Connector Line*, we concluded that UP does not have power to control CNW because of their relationship regarding Powder River Basin coal. Further, the UP-CNW interchange relationships do not give UP the power to control CNW, within the meaning of section 11343. UP and CNW have a mutually beneficial operating relationship regarding transcontinental traffic interchanged at Fremont and Omaha/Council Bluffs. UP has a very strong bargaining position with respect to CNW, but this does not amount to control over CNW. The UP-CNW route for transcontinental traffic is an efficient service route preferred by many shippers. Although UP may be in a position to negotiate favorable terms with CNW with respect to interchange operations, it is not in a position to exercise managerial control over CNW's operations. KCS's novel allegations regarding control are not convincing.

The terms and the negotiating process of the CNW settlement do not in any way show that UP has, or will acquire, control of CNW. In the settlement CNW obtained assurances, somewhat general in nature, that UP will continue to cooperate in the handling of traffic interchanged at Fremont and Omaha/Council Bluffs. CNW also obtained limited protection for the competitiveness of UP-CNW rates to Chicago with UP-MP rates to St. Louis. CNW, further, obtained a beneficial pooling agreement. The refusal of UP to agree to indemnification or volume protection terms has absolutely no significance to alleged unlawful control or to any other issue in these proceedings. In recent decisions we have expressed our dis- [615] approval of those types of terms as generally not in the public interest. Therefore, there was no reason for UP to agree to such terms or for CNW to vigorously demand them, inasmuch as we would not likely have approved them even if they had been agreed to. Rather, CNW succeeded in negotiating settlement terms which

provide it with some degree of protection and which are compatible with the public interest.

The allegations of unlawful control are groundless. The primary applicants will not be in a position to exercise unlawful control of CNW before or after consolidation, and regardless of whether the settlement terms are approved.

Jurisdiction. Protestants to the pooling application contend that the proposed operations are not pooling within the meaning of 49 U.S.C. 11342 and, further, that the proposed operations would have anticompetitive impacts on competition for traffic interchanged at Kansas City.

Carriers may not agree to pool their traffic, services, or earnings without our approval under 49 U.S.C. 11342.[133] This section of the statute does not define pooling and its language is not sufficiently definite to exclude differences in views concerning its meaning. *Boston & M. R. Pooling Application*, 298 I.C.C. 703, 708 (1956). The principal condition we have recognized for exercising jurisdiction under section 11342 is that there be an actual competitive relationship between the involved carriers. *American Rail Box Car Co. - Pooling*, 347 I.C.C. 862, 877 (1974).

The proposed operations fall within our jurisdiction under section 11342. CNW and MP clearly compete for traffic moving in the Omaha/Council Bluffs-Kansas City corridor. CNW's route between Council Bluffs and Kansas City is very circuitous and CNW is not a significant competitor for local traffic between those two points. CNW and MP, however, do compete for traffic originating and terminating in the service area covered by the

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[133] Pooling operations may also be authorized under 49 U.S.C. 11124 and 11125, relating to rerouting of traffic and directed service. Those sections are not applicable here.

pooling agreement. MP participates in this traffic on an interline basis. Therefore, a competitive relationship exists. Further, the proposed operations constitute a service pool within the scope of section 11342. Operations where one carrier handles traffic on a second carrier's account is pooling. This type of operation has been found to be a service pool even when the second carrier's equipment is used and when the second carrier retains the right to route traffic over its own less efficient route. *Railroad Freight Traffic Between Everett and Bellingham, Wash.*, 298 I.C.C. 520 (1956).

The pooling operations will result in CNW and MP taking a common position on service, to a certain degree, on competitive traffic. This partial elimination of service differences gives rise to our jurisdiction over the agreement. However, we must determine whether the common posi- [616] tion will unreasonably restrain competition. Protestants contend, and CNW and MP agree, that the pooling operations, overall, will make CNW more competitive with MP in the affected transportation markets. This overall enhancement of competition is a reason for approving the agreement, not for removing the agreement from our jurisdiction. Therefore, we conclude that we have jurisdiction to consider the pooling agreement under 49 U.S.C. 11342.

Criteria and Conclusion. In order to approve a pooling application under 49 U.S.C. 11342, we must find that the proposed operations (1) will be in the interest of better service to the public or of economy of operation, and (2) will not unreasonably restrain competition. Further, in order to approve the pooling agreement as a condition to the merger, we must find that it will be consistent with the public interest.

The record shows clearly that the pool service will be in the interest of better service to the public and economy of operation. Most of the traffic that will move in the

pooled operations now moves over CNW's route via Des Moines. The MP route to be used in the pooling operations in about 200 miles shorter than the CNW route and will have an operating time that is about 26 hours shorter. Therefore, pooling operations will provide substantial increases in operating efficiency and economy for traffic shifted from the CNW route.

The pooling operations will not unreasonably restrain competition. CNW at present is not a strong competitor for traffic covered by the pooling agreement. The pooling agreement will provide CNW with a more efficient and economical route between Council Bluffs and Kansas City. Overall, this will strengthen CNW's competitive position with respect to the involved traffic.

Protestants to the pooling application primarily contend that it will not be consistent with the public interest because of alleged anticompetitive impacts at Kansas City on north-south traffic. They assert that the pooling agreement will give MP advantages in obtaining interline traffic from CNW at Kansas City that it would not be able to derive from the merger itself or from the merger subject to the Council Bluffs-Kansas City trackage rights originally sought by CNW.

The proposed pooling operations will not increase MP's ability to divert CNW interline traffic from other carriers at Kansas City. The traffic moving in pool service will remain in CNW's account and will be delivered to CNW's yard at Kansas City. The pooling operations will not provide MP with any advantages in obtaining the involved traffic that it would not have after the merger with respect to other CNW traffic at Kansas City. Although various protestants have estimated traffic losses which they assert will ensue from implementation of the CNW settlement, we do not find these estimates to be persuasive (see Appendix G).

[617] MP's activities under the pooling agreement involve providing crews to operate CNW trains over MP's Council Bluffs-Kansas City line. Protestants assert that use of MP crews gives MP two advantages in obtaining the involved traffic. First, they argue that the MP crews can provide slower service operating pool trains than they provide for MP trains, unless the traffic is to be interlined with MP. Second, protestants argue that MP crews will have access to CNW train consists for the pool trains and will be able to obtain information from the contents that will assist MP's marketing department in soliciting the involved traffic from the shippers. These arguments are not persuasive.

First, if MP crews were to provide discriminatory service in operating pool trains they would violate the terms of the pooling agreement.[134] CNW, therefore, may pursue remedies under the agreement to preserve equality of service. Further, we note that no protestant to the pooling application opposed the CNW trackage rights application between Council Bluffs and Kansas City. The pooling agreement does not give MP any significantly greater opportunity to delay CNW traffic without CNW's knowledge than would the previously sought trackage rights. In any event, CNW will know the arrival and departure times of pool trains and will be able to tell if they are being delayed.

Second, MP access to CNW train consists should not provide MP with any significant marketing advantages. CNW can provide MP with abbreviated train consists that will supply all necessary operating information without disclosing confidential shipper information. Further, the traffic eligible for pool service consists primarily of grain shipments. The origin points and major ship-

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[134] Section 1.3 of the agreement provides, in part, that "MPRR agrees that the C&NW trains shall be handled without discrimination and without giving preference to MPRR trains."

pers of grain in the involved area are well known to the competing railroads. MP will not likely obtain any information from CNW trains consists that it does not already have.

Protestants also assert that CNW will favor MP as an interline carrier because of its dependence on UP for interline traffic at Fremont and Omaha/Council Bluffs for east-west traffic. The pooling agreement, however, does not increase CNW's dependence on UP for east-west traffic. Therefore, the pooling agreement will not result in any diversions of interline traffic at Kansas City to MP beyond the diversion that may occur solely as a result of the UP-MP consolidation.

Protestants argue that the $750,000 fixed fee for pooling will encourage CNW to route as much traffic as possible over the pool route rather than over its own route via Des Moines or to St. Louis in order to lower the average costs per car moving in pool service. Inasmuch as CNW has fixed costs for its own routes, however, the pooling fixed fee [618] does not give CNW an incentive to route traffic over the pool route unless that route is more efficient for the traffic. Also, trackage rights compensation agreements may include a fixed annual fee element. Therefore, the pooling agreement compensation formula does not necessarily encourage a greater movement of CNW traffic via the MP line than would the terms of a trackage rights agreement. Further, because the pooling arrangement will not give MP an advantage in obtaining CNW interline traffic, any economic incentives for the routing of traffic over the pool route would not have an adverse impact on other carriers.

We conclude that the pooling agreement will be in the interest of better service to the public and economy of operation, and that it will not unreasonably restrain competition. Further, the pooling agreement will not have any adverse impacts on the public interest. Therefore, we will approve the pooling agreement.

Labor Protection. In approving the pooling application, we will give consideration to the interests of affected employees. CNW acknowledges that the pooling arrangement may have some labor impact. Because the pooling arrangement is intended as a substitute for the trackage rights originally sought, CNW asserts that the employee protective conditions we usually impose in trackage rights proceedings would be appropriate. Those conditions are set forth in *Norfolk and Western Ry. Co. —Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Executives Ass'n* v. *United States*, No. 78-2157 (D.C. Cir., decided April 9, 1982) (*NW-BN* conditions).

Various labor organizations in these proceedings assert that the pooling agreement should be subject to a modified form of the conditions set forth in *New York Dock*, the conditions usually imposed pursuant to 49 U.S.C. 11347 in railroad consolidation proceedings. The labor parties contend the *New York Dock* conditions are applicable because the pooling arrangement is directly related to the proposed consolidations.

We will impose the *NW-BN* labor protection conditions on our approval of the pooling agreement. The pooling operations are part of a settlement agreement and are not ancillary operations of the primary applicants involving implementation of the consolidations. Therefore, the *New York Dock* conditions are not appropriate. We are not, by statute, required to impose any particular level of labor protection on pooling arrangements. Inasmuch as the CNW-MP pooling arrangement is intended as a substitute for trackage rights, we will subject the pooling arrangement to the *NW-BN* labor protection conditions.

Labor Protection

We are required by 49 U.S.C. 11347 and 11344(b)(4) to consider the interests of, and provide protection for,

carrier employees affected by rail [619] consolidations. We have considered the effect of the proposed transactions on the interests of carrier employees. We find that the transactions, with the conditions discussed below, are consistent with the public interest insofar as carrier employees are concerned.

Applicants have demonstrated that these transactions will directly benefit labor both by producing a substantial net increase in existing and future employment opportunities and by increasing the job security of their present employees. The UP-MP consolidation will result in the creation of 822 jobs, the abolition of 535 jobs, and the transfer of 127 positions, and the UP-WP consolidation will result in the creation of 291 jobs, the abolition of 342 jobs, and the transfer of 188 jobs. In the UP-MP transaction these employment effects will be felt by the end of the first year of consolidated operations. Similarly, these effects will be experienced by the end of the third year of consolidated operations in the UP-WP transaction. Therefore, by the end of the third year of consolidated operations, the combined UP-MP-WP system will produce a net increase of 235 positions.

While several opponents to these transactions, including those joint protestants collectively referred to as "Certain Labor Organizations" (CLO),[135] argue that applicants have downplayed the impact on labor, none of them has substantiated its assertions. In developing their labor impact estimates applicants consulted with recently merged or consolidated railroads, and performed their own detailed sampling studies. We find applicants' estimates reasonable. While the resulting displacements will be significant in number, they do not constitute a wholesale disruption of the carriers' work force. The overall

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[135] CLO is comprised of the Brotherhood Railway Carmen of the United States and Canada, International Brotherhood of Electrical Workers, International Brotherhood of Firemen, and Oilers and Sheet Metal Workers' International Association.

disruption is clearly not unusual in comparison to other rail consolidation transactions.

In *New York Dock*, 360 I.C.C. 60, we described the minimum protection to be afforded those employees affected by a consolidation, absent a voluntarily negotiated agreement. The protections of *New York Dock* include a mandated 90-day notice of employment actions; negotiated implementation of employment changes resulting from a consolidation with compulsory arbitration of disputes; compensation of dismissed employees and differential compensation of displaced employees, at the rate of their last year of employment, for six years after impact (or for their period of employment if less than six years); reimbursement of moving expenses; and protection against loss from the sale of a home. We may tailor employee protective conditions to the special circumstances present in a particular case. As we set forth in *Railroad Consolida-* [620] *tion Procedures*, 363 I.C.C. 784, 793 (1981), however, unless it can be shown that because of unusual circumstances more stringent protection is necessary to provide employees with a fair and equitable agreement, we will provide protection at the minimum level mandated by 49 U.S.C. 11347.

Several labor organizations cluding the Brotherhood of Locomotive Engineers (BLE), the Brotherhood of Maintenance of Way Employees (BMWE),[136] and CLO which have filed comments in these proceedings seek labor protective conditions broader in scope than those established in *New York Dock*. None of these organizations has established the existence of any unusual circumstances unique to these proceedings which would warrant increased protection.

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[136] BMWE is joined in its conditional opposition to the primary application by the Brotherhood of Railroad Signalmen, the Brotherhood of Railway and Airline Clerks, International Association of Machinists and Aerospace Workers, and United Transportation Union. These joint parties will hereafter be collectively referred to as BMWE.

BLE argues generally that the magnitude of labor displacements resulting from these transactions warrants modification and expansion of the *New York Dock* conditions. As we stated above, the displacements which will result here have been shown to be reasonable and, therefore, do not warrant imposition of more stringent protections. CLO argues generally that the present state of the economy with attendant high unemployment and interest rates warrants greater protections than those afforded by *New York Dock*. Variables associated with the state of the national economy are not the kinds of "unusual circumstances" which necessitate increased protection in the context of a particular consolidation proceeding.

BMWE argues in its initial brief that the *New York Dock* conditions fall short of the statutory obligations imposed on us by section 11347 of the Act. This argument is without merit. We find that the protection of *New York Dock* is appropriate for the protection of applicants' employees affected by this proceeding without any modification. The *New York Dock* conditions are significantly more protective of labor interests that any previously imposed set of employee protective conditions, and they satisfy the statutory requirement of 49 U.S.C. 11347. *New York Dock Railway* v. *U.S.*, 609 F.2d 83 (2d Cir. 1979). We have consistently rejected modifications similar to those proposed here in prior consolidation proceedings.[137] We continue to reject them for the reasons set forth in those cases. We find no unusual

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[137] Finance Docket No. 28905 (Sub-No. 1), *CSX Corp.-Control-Chessie and Seaboard C.L.I.* (not printed), served October 16, 1981; *BN-Frisco*, 360 I.C.C. 784, 946 (1980); *Norfolk and Westtern Ry. Co.-Pur.-Illinois Term. R. Co.*, 363 I.C.C. 882, 888-890 (1981); *Norfolk Southern*, 366 I.C.C. at 231; *Guilford Transportation Industries, Inc.—Control—Boston and Maine Corporation*, 366 I.C.C. 294 (1982), and *Guilford Transp. Industries, Inc.-Control-D&H Ry. Co.*, 366 I.C.C. 396, 405-406 (1982).

circumstances in this proceeding [621] requiring imposition of conditions in excess of the statutory minimum.

Applicants have established that employment effects resulting from these transactions will be felt within three years of the institution of consolidation operation. BLE argues that labor impacts could be experienced at a later point in time. If such impacts do in fact occur, and can be attributed to the consolidation, affected employees of applicants will still be entitled to the protection of *New York Dock.*

The American Train Dispatchers Association, BLE, and BMWE also seek extension of employee protective conditions to employees of non-applicant railroads which may be affected by the consolidation. We have rejected such requests in the past and we reaffirm that policy. *See BN-Frisco,* 360 I.C.C. at 948-950, *Missouri-Kansas-Texas,* 632 F.2d at 410-13. In making these requests ATDA and BMWE argue that 49 U.S.C. 11344(b)(4) requires us to impose labor protective conditions to protect all railroad employees, both of applicants and non-applicants alike, which are adversely affected by a consolidation proceeding.

This subsection of the Act mandates that we take into consideration, *inter alia,* "the interest of carrier employees affected by the proposed transaction," in determining whether the merger or control of two or more class I railroads is consistent with the public interest. The general language in section 11344(b) is designed to focus our consideration of these primary transactions, and is not intended to be used as a vehicle for mitigating incidental impacts. This language, which itemizes the several criteria to be considered in making our public interest determination in a consolidation proceeding, in no way supplements or contradicts the specific Congressional directive concerning labor protective conditions in 49 U.S.C. 11347. The meaning of the latter

section of the act, as Congress confirmed by pertinent legislative history, is well established. Congress, at the time of enactment of the Transportation Act of 1940, did not consider protection of employees beyond those employed by the carriers that were parties to the transaction itself. This legislation was unchanged until the 4R Act, which expanded the scope of employee protection, but not the class of employees to be protected. *Id.*, 360 I.C.C. at 948-950; *Cf. Railway Labor Executives' Association* v. *United States*, 216 F. Supp. 101 (E.D. Va. 1963). In these premises, ATDA's and BMWE's arguments are misplaced.

As is our usual practice, we will impose the conditions specified in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653, 664 (1980) on the trackage rights approved as part of the primary [622] application.[138] Similarly, in the DRGW, SP, and MKT responsive trackage rights applications which we are approving, and in the CNW-MP pooling agreement as previously discussed, we find that employees will be adequately protected by imposition of protective conditions specified in *NW-BN*, as modified in *Mendocino. Railway Labor Executives Ass'n* v. *United States*, 675 F.2d 1248 (D.C. Cir. 1982). *Cf. CSX*, 363 I.C.C. at 592.

One final point must be addressed. ATDA has requested imposition of two specific conditions: first, that the form of corporate control over WPRR and MPRR by UPRR and its affiliates not be altered without further

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[138] The *NW-BN-Mendocino* conditions are similar to the *New York Dock* conditions, but are applied in the context of trackage rights proceedings. The imposition of these conditions here is a matter of consistency but has little practical significance, since all affected employees of applicants will also be covered by the *New York Dock* conditions imposed on the primary transaction.

order of the Commission after notice and opportunity for a hearing; and, second, that no transfer of WPRR or MPRR train dispatching work, or transfer of certain train dispatchers be accomplished without further order of the Commission after notice and opportunity for a hearing. We agree with applicants that neither of these conditions is warranted. In the event that the corporate structure of the new system is reorganized after consolidation, the interests of any affected employees will be appropriately protected at that time. Even in an intracorporate transaction which qualifies for the class exemption set forth at 49 CFR 1111.5(c)(3), (now codified at 49 CFR 1111.2(d)(3)), the carriers are not relieved of their obligation to protect the interests of employees. *See* 49 U.S.C. 10505(g). Concerning the second condition sought, there is no evidence of record that applicants have any intention of transferring the dispatchers in question. Moreover, we do not believe it would be appropriate to fetter applicants operating capabilities by precluding it from acting in the future in ways necessary to enhance labor productivity. Imposition of a notice and hearing requirement in this context would be unduly burdensome on these carriers. Again, in the event employees might be impacted in the future, as a result of this consolidation, they will be afforded the protections we have imposed here.

ENVIRONMENTAL IMPACTS

On August 28, 1981, the Commission's Energy and Environment Branch (EEB) issued an Environmental Assessment (EA) analyzing the primary application, related applications, and responsive applications. An addendum to the initial EA was issued on December 15, 1981, after consideration of comments filed by Santa Fe; OSC; MKT; the Sierra-Curtis [623] Neighborhood Association; UP; and the United States Environmental Protection Agency (EPA).

The EA, as modified by the addendum analyzes the impacts of the consolidation on (1) land use, (2) labor, (3) transportation, (4) energy, (5) noise, (6) air quality, (7) safety, (8) aquatic and terrestrial ecology, and (9) historic resources. We will summarize the general conclusions of EEB rather than repeat the detailed analysis. We will also address EEB's response to the more significant aspects of the public comments.

The primary transactions, including related rehabilitation, retirement, and construction activities, are expected to cause insignificant energy consumption and environmental impacts. The same expectations are held if any (or all) of the responsive applications are granted.

This consolidation will create a new system comprised of 22,760 route miles in 21 States in the western two-thirds of the United States. Due to greater market power and the availability of combined UP-MP-WP routings and single-line service, the new system will be able to divert traffic from other rail carriers, and from motor carriers, and reroute traffic more efficiently. Concerning the efficiency of operations on the new system, EEB admitted in response to comments from OSC that its determination of net changes in energy consumption utilizing gross ton miles per gallon does not provide an exact measure of expected fuel consumption decreases. It added, however, that absent carload by carload or train by train data, its use of gross ton miles per gallon in its savings predictions provides a reliable indicator which is useful in determining the rough order of magnitude of expected impacts. EEB continues to adhere to its position that its average fuel consumption figures for the new system are approximately correct. Traffic diverted to, and rerouted over the new system will change traffic levels of several yards and line segments, and will change the overall net gross ton miles and train miles for both the combined system and other carriers affected by the merger. EEB

also points out in response to OSC's comments that an increase in gross ton miles resulting from intramodal diversion should not be construed to mean a corresponding increase in fuel consumption. Such a position fails to take into account greater fuel efficiency of particular railroads. After considering comments of OSC, Santa Fe, and MKT, EEB concluded that on the basis of the primary applicants' traffic projections and planned reroutings, approximately 10 million gallons of fuel would be saved annually.

Though significant environmental impacts are not expected, four line segments may experience increases in noise levels of greater than three decibles and one segment will experience an increase of more than five decibles on the Leq scale. EEB concluded, after considering comments [624] filed by EPA and the Sierra-Curtis Neighborhood Association, that no significant noise increases will result from the consolidation. In response to the latter comment, EEB stated that noise levels at WP's Sacramento Yards should not be raised noticeably above existing levels as a result of this consolidation. The preexisting noise problem at Sacramento Yards is the subject of ongoing dialogue between the community, WP, and the County Health Office. Moreover, EPA regulations scheduled to become effective in January 1984 will afford these citizens protection against further noise level environmental degradation.

EEB also determined that increases in air pollution within the Air Quality Control Regions (AQCRs) containing non-attainment or Class I areas will be minimal, amounting to one percent or less of emissions within each AQCR.

As part of the consolidation plan, the three lines will undertake rehabilitation, retirement, and construction projects at various locations along the combined system. Track construction, track, tie, and ballast replacement

and removal; bridge construction; and removal of yard facilities are among the activities which will be carried out during these projects. No adverse water quality, wildlife, or historic resource impacts are expected from these proposed projects, although precautions should be taken to ensure retention of adequate floodways, removal of soil contamination, and preservation of historic structures.

Concerning the various responsive trackage rights applications to be undertaken as conditions to the approval of the primary application, some responsive applicants would experience an increase in gross ton-miles traveled. The overall effect of these trackage rights, however, will be a reduction in train miles traveled due to efficient rerouting of trains. Therefore, the overall impact of the trackage rights on energy consumption, air pollution, noise, and safety should be beneficial. Additionally, our approval of any or all of the inconsistent applications would not alter aquatic and terrestrial resources or historic sites.

EEB recommends the following four conditions in order to alleviate the slight environmental impacts of the proposed consolidation.

(1) For MP's yards in St. Louis and Kansas City and WP's yards in Oakland and Reno, the following conditions are recommended:

> (a) Must meet the current regulations for active retarders, car coupling impacts, switcher locomotives, and locomotive load cell test stands or,
>
> (b) Show that consultation has taken place with appropriate local agencies and that effective measures are being implemented to mitigate noise levels emitted from these yards.

(2) UP must comply with a request by the U.S. Corps of Engineers that the siding to be constructed near Denmon, NE meet the same capacity for flood flow as the adjacent existing track.

[625] (3) For the retirement of fueling and maintenance facilities at Omaha, NE, Salina, KS, and Stockton, CA, applicants must adhere to the following condition:

(a) The MP and UP shall abide by all applicable Federal, State, and local regulations regarding disposal of hazardous or toxic waste during abandonment of MP's Omaha and Salina facilities and UP's Stockton facilities.

(4) For MP's depot in Topeka, KS and freight house in Omaha, NE the following measures are recommended:

(a) That the subsequent purchaser(s) of the properties submit plans for future use of properties, including historic structures, to the Commission and to the Advisory Council on Historic Preservation for review; and

(b) That in the event the involved historic structures are eventually demolished, the subsequent purchaser(s) will, prior to demolition, ensure that appropriate measures are taken to adequately record the structure according to standards prescribed by the Historic American Engineering Record and Historic American Buildings Survey.

No mitigating measures are recommended for any of the responsive applications.

In light of the conclusions reached by EEB that the proposed consolidation will not have a significant environmental impact, substantial mitigating conditions are not required. The conditions that EEB has proposed, and the primary applicants are amenable to, are designed to alleviate slight impacts that may arise from the transaction. In two specific areas we will adopt the conditions proposed by EEB: (1) condition 2 concerning compliance with a U.S. Corp of Engineers request that a siding being constructed at Denmon, NE meet certain flood flow capacity standards, and (2) condition 4 concerning the

plans of any subsequent purchasers for the depot facilities in Topeka, KS, and the freight house in Omaha, NE.

We will not impose the remaining conditions. Essentially, these remaining conditions address compliance with certain Federal, State, and local regulations. Our decision not to impose these conditions will in no way alter the primary applicants' obligations to adhere to such regulations. Moreover, violations of these rules and regulations would not be enforceable before this Commission. In such circumstances, we see no purpose in imposing these conditions. *Cf. Norfolk Southern*, 366 I.C.C. at 234-235.

No mitigating measures were recommended for any environmental impacts arising from responsive applications or agreements.

[626] PETITION FOR INCLUSION

The City of Prineville Railway (COP) filed a petition seeking the option to be included in the consolidated carrier within 5 years of consummation. COP has a 19 mile main line from Redmond to Prineville, OR; it connects with UP at Redmond by the use of trackage rights over a BN subsidiary.

COP is a short-line, lumber hauling railroad which depends for its equipment needs on UP and BN; it is suffering because of the depressed condition of the lumber industry. COP makes no argument which relates its request for inclusion to any consequence of consolidation; indeed, on cross-examination its general manager agreed that the request was not related to the proposed consolidation.

We will therefore deny COP's request for an option to be included in the consolidated system. No other railroad has sought inclusion into the consolidated system.

FIXED CHARGES

We are required to determine the effect on total fixed charges that will result from the proposed transactions.

Applicants have each covered their respective fixed charges for the 5-year period 1977-1981, and the record contains no evidence that fixed charges will increase as a result of the proposed consolidations.

If the transactions are consummated UPC will preserve the separate corporate identity of both MPC and WPRR. However, the operations of MPRR will be coordinated with UPRR, while the operations of WPRR will be integrated with those of UPRR. The integration and coordination of the three railroads will be accomplished through the creation of a "second tier" railroad holding company which, directly or indirectly, would own all the stock of UPRR and MPRR. In turn, UPRR would own the stock of WPRR.

As a result of the above corporate structure, the debts of MPRR, MRTC, MPC and WPRR will not be assumed by UPC or by any of its related operating subsidiary companies. The completed UPRR-MPRR-WPRR system will make capital expenditures for various purposes, including the acquisition of additional equipment to handle larger traffic volumes and the regrading of the main line and secondary line of MPRR and WPRR and their subsidiaries. UPC states that due to the increase in net traffic revenues and the efficiencies that will be realized by the complete UPRR-MPRR-WPRR system, it does not anticipate that the capital expenditures required will result in any increase in total fixed charges.

[627] TERMS OF TRANSACTIONS AND SECURITIES ISSUANCES

UPC-MPC

Consolidation Proposal. The proposed transaction involves acquisition and exercise of control of MPC, MPRR, and MPRR's rail carrier subsidiaries, by UPC and its wholly-owned subsidiaries, PRSI and UPRR. Such control will be acquired by merging UP Subsidiary Corporation (UP Subsidiary), a wholly-owned UPC subsidiary, into MPC. The merger will be effected by converting all issued and outstanding shares of MPC stock into shares of UPC common and preferred stock, in accordance with the formula discussed below under "Exchange of Stock". Each share of UP Subsidiary stock will be converted to a share of new MPC stock. As a result of the merger, UPC will hold all the issued and outstanding shares of MPC stock and will contribute all these shares to PRSI.

Prior to the transfer of the MPC stock to PRSI, UPC will contribute all of the issued and outstanding shares of UPRR stock to PRSI. Following these transfers, UPRR and MPC will be commonly owned by PRSI. UPC will, through PRSI, indirectly own and exercise control of MPC, and of UPRR and MPRR, and their rail carrier subsidiaries.

Exchange of Stock. UP Subsidiary will be merged into MPC. At that time, each issued and outstanding share of MPC common stock will be converted by law into 1.1 fully paid and nonassessable shares of UPC common stock [139] and 0.275 fully paid and nonassessable shares of UPC $7.25 Convertible Preferred Stock (New Preferred Stock). Also at the time of merger, each issued and outstanding share of UP Subsidiary common

[139] The exchange ratio of 1.1 shares of UPC common stock for one share of MPC common stock gives effect to a two for one split of UPC common stock that occurred on April 25, 1980.

stock will be converted by law into one share of new MPC stock.

The Purchase Price. UPC estimates that approximately 17,334,654 shares of its common stock, giving effect to the two for one stock split, and 4,333,664 shares of its new preferred stock, will be issued in exchange for the shares of MPC common stock issued and outstanding at the time of merger. This estimate is based on the number of shares of MPC common stock issued and outstanding on January 4, 1980, and recognizes MPC's obligation, under the Agreement and Plan of Reorganization, to take all steps necessary to redeem or convert into MPC common stock, at least 30 days prior to the date of merger, all issued and outstanding MPC 8 percent Convertible Subordinated Debentures, Due 1994. Under the Agreement of Merger, it is contemplated that 200 shares of new MPC common stock will be issued in exchange for the shares of UP Subsidiary common stock issued and outstanding at the time of merger.

[628] No fractional shares of UPC common stock or UPC new preferred stock will be issued upon conversion of the MPC common stock. Holders of MPC common stock may, in accordance with the terms of the Agreement of Merger elect upon conversion either to sell any fractional interest to which they are entitled or to purchase any fractional interest necessary to make up a full share of UPC common stock or UPC new preferred stock.

The value placed on the MPC common stock by UPC was $998,910,000. This aggregate value is composed of $374,862,000 of UPC $7.25 Convertible Preferred Stock ($86.50 stated value times 4,333,664 shares to be issued) plus $624,048,000 of UPC common stock.[140]

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[140] The total value of the common stock is based on the closing price of UPC common stock on January 4, 1980, ($72 per share)

Fairness of Terms. The control transaction will be effected using a stock exchange ratio which has been approved by applicants' respective Boards of Directors and by an overwhelming majority of the stockholders of both companies, all of whom consider the exchange ratio to be fair and reasonable. No shareholder of UPC or MPC has protested the financial terms of the transaction before the Commission.

The fairness of the proposed stock exchange ratio was attested to by independent experts employed by applicants' managements. In this respect, one firm assessed, on an historical basis, the relative financial and operating performance of UPC and MPC for the 5 year period, 1975-1979. Examined were historical levels and growth rates of revenues, operating income, pre-tax and net income and the percentages of revenues represented by each such income item so as to determine the relative efficiency and profitability of operations. Also examined were after-tax returns on average common equity and total invested capital and the levels and growth rates of funds from operations and capital expenditures. This type of analysis gave an historical perspective from which the firm was able to judge the reasonableness of the financial forecasts developed by UPC and MPC. Their analysis also included examination of historical stock market data relating to UPC and MPC and the other railroads and railroad holding companies thus enabling them to understand the market performance of the common stock of UPC and MPC. Their overall analysis also included an assessment of the general creditworthiness of UPC and MPC. From this study, they concluded that MPRR would be able to continue to finance its existing business and planned expansion and that the existing debt ratings of UPC and UPRR would not be altered as

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and the number of shares of stock to be issued, not giving effect to the two-for-one stock split approved April 18, 1980 (8,667,327 shares).

a consequence of the merger. They also reviewed financial forecasts of UPC and MPC for the period 1979-1984 [629] so as to determine the relative contributions of each company to the revenues, earnings and cash flow of the combined entity and the relative contributions of rail and non-rail lines of business to the combined entity and concluded that such forecasts were reasonable estimates of future performance. Financial terms of two other railroad mergers were reviewed and disclosed that the terms of the proposed UPC-MPC merger produced results generally similar to those observed in the two transactions analyzed.

A second independent firm concluded that UPC's offer is fair to corporate MPC and satisfies the investment demands of both income and capital gain oriented MPC shareholders. They reached this conclusion based on a review of the historical record of the two companies separately and as a combined enterprise in respect to capitalization, assets, sales and earnings, sources of earnings, market prices and price-earnings ratios and dividends and current return. Also considered in their analysis of the proposed terms was an assessment of the future value of an investment in the combined UPC-MPC versus the potential for an investment in MPC without the consolidation. Consideration was given to earnings prospects, dividend prospects, and market potentials. As to earnings prospects, their analysis showed that there would be substantially greater market appreciation in the shares of the combined entity than would be possible for shares of the present MPC. As to dividend prospects, their study revealed that the securities UPC offered to MPC's shareholders should produce a greater income return to MPC shareholders than would be possible if MPC shareholders retained their present shares. From their market potential study the firm concluded that the UPC offer is fair when viewed from that study as well as when assessed by the return of income which may be anticipated by MPC

shareholders. They also concluded that MPC, as a corporate entity, will benefit financially from the proposed affiliation with UPC and that such benefits are in addition to operating benefits. They include the potential for an improved debt to total capitalization ratio; an improvement in interest coverage and margin of safety ratios; and a stronger cash-flow situation.

This firm concluded that, from the point of view of the MPC shareholder, the UPC offer involves a current premium and a tax-free exchange. Also, that MPC shareholders interested primarily in yield will have the opportunity to benefit from a potentially higher level of income through the UPC preferred and common shares offered than might be expected without the proposed consolidation. In their opinion the senior position of UPC preferred stock provides greater dividend protection as well as more market protection against a potential decline in market values of the common stock. On the other hand, they state that the con- [630] version feature of the preferred and the greater appreciation potential in the shares of UPC after the consolidation makes the offer attractive to the capital gains oriented investor.

The stock exchange ratio in the UPC-MPC transaction is fair and reasonable to the shareholders and should be approved. Additionally, the stock exchange ratio was derived by arms' length negotiations between the applicants and was approved by the respective boards of directors and by a majority of the stockholders. No stockholders have challenged the fairness of the exchange ratio in this proceeding. Accordingly, all those who could be affected by this proposal have been afforded an opportunity to evaluate the proposal in light of their respective interests and are apparently satisfied with the result. In light of this evidence and our own review of the exchange ratio, we find that it is fair and reasonable to the shareholders and should be approved.

William R. Wesson, Anne G. Wesson, and John Charles Vaiani (WWV) contend that the proposed UPC-MPC transaction is unfair and unjust because it is part of a series of transactions depriving holders of MPRR Class B stock of part of their equity in the assets of the railroad and of various voting rights. WWV seek here to relitigate the recapitalization plan that abolished Class A and Class B MPRR stock and replaced them with a single class of stock. That recapitalization was the result of the settlement of a shareholder derivative suit brought by MPRR Class B shareholders. The terms of the settlement were reviewed by the court and found to be fair to all MPRR shareholders. *Levin* v. *Mississippi River Corporation*, 59 F.R.D. 353 (S.D.N.Y., 1973), *aff'd sub nom. Wesson* v. *Mississippi River Corp.*, 486 F.2d 1398 (2d Cir., 1973), *cert. denied*, 414 U.S. 1112 (1973), *reh. denied*, 415 U.S. 939 (1974). This Commission also reviewed the terms of that recapitalization in the proceeding seeking authority for MPRR to issue the new shares of stock necessary to effect the terms of the settlement and found those terms to be just and reasonable. *Missouri Pacific Railroad Co., Securities*, 347 I.C.C. 377 (1973), *aff'd sub nom. Gabriel* v. *United States*, 416 F. Supp. 810 (D.N.J., 1976), *aff'd* 429 U.S. 1011 (1976), *reh. denied* 429 U.S. 1124 (1977); Commission decision also *aff'd sub nom. Labelle Gillespie* v. *United States, Civil Action No. 74-239-C(2)* (E.D. Mo., 1974). The recapitalization was consummated on January 21, 1974. The matters raised by WWV have been considered by several courts and by this Commission in earlier proceedings and are now subject to the law of *res judicata*. *See William R. Wesson* v. *Interstate Commerce Commission*, No. 79-1513, 79-1514 (D.C. Cir., March 25, 1981).

WWV assert that the court decision approving the settlement was obtained through fraud and that the doctrine of *res judicata* should not [631] apply. They contend that the alleged fraud arises from an undisclosed con-

flict of interest by one of the intervening Class B shareholders (Robert Le Vasseur) who also owned shares of Class A stock. This argument is not persuasive. Merely alleging fraud does not suspend the finality of a judgment. The court decision approving settlement of the derivative suit remains final unless it is vacated in response to an appropriate motion. WWV do not indicate that they have filed a motion seeking vacation of the decision approving the settlement. Further, there appears to be little likelihood that the court would vacate its decision on the basis of a conflict of interest on the part of one intervener. The plaintiff who brought the action (Betty Levin) has not been alleged to have had any conflict of interest preventing her from fairly representing the interests of the Class B shareholders. Further, Alleghany Corporation, owner of a majority of the Class B shares, intervened in the suit and participated actively in the litigation and settlement. Alleghany has not been shown to have had any conflict of interest. The interests of Class B shareholders were represented fully and fairly in the prior litigation. Their rights have been finally determined. Their Class B certificates no longer represent stock ownership in MPRR. Rather, those certificates evidence the right to receive cash and shares of MPC stock in accordance with the 1974 recapitalization and the 1978 merger of the MPRR and its subsidiaries into a subsidiary of MPC. Finance Docket No. 28586 (Sub-No. 1), *Missouri Pacific Railroad Company—Merger—Missouri Pacific Railroad Company, et al.* (not printed) decided March 8, 1979. Holders of unexchanged shares of MPRR Class B stock certificates have no rights cognizable in this proceeding arising from their dissent to the 1974 recapitalization and their refusal to exchange those certificates.

Kendall Laughlin contends that the proposed UPC-MPC transaction would be unfair to the holders of MPRR income bonds and debentures. Laughlin argues that UPC and PRSI, following consolidation, will have control of

MPPR profits, but will not assume responsibility for MPRR's obligations. He asserts that this will enable UPC and PRSI to withhold payment of interest on MPRR bonds and debentures. These arguments are not persuasive. The indentures underlying the involved bonds and debentures give the holders of these securities a contractual right to be paid out of MPRR revenues which is prior to the right of MPRR shareholders to receive dividends. These rights of the bond and debenture will not be affected by the UPC-MPC consolidation.

[632] *UPC-WPRR*

Consolidation Proposal. The proposed transaction also involves the acquisition and exercise of control of WPRR and its rail carrier subsidiaries by UPC, and its wholly-owned subsidiaries, PRSI, PACS, and UPRR. Such control will be acquired by merging Union Subsidiary, Inc. (UNS), a wholly-owned subsidiary of PACS, into WPRR, and by transferring all issued and outstanding shares of WPRR stock from PACS to UPRR.

PACS and UPRR currently own approximately 85 percent of the issued and outstanding shares of WPRR Class A common stock. All these shares are held by a trustee in an independent voting trust, pending our approval of this control application. Following receipt of our approval and authorization of the proposed transaction, PACS and UPRR intend to take appropriate steps to cause the WPRR Class A common stock that they own to be voted in favor of the merger of UNS into WPRR. Moreover, under a Stock Purchase Agreement dated January 22, 1980, PACS will acquire for $20 per share all 10,000 issued and outstanding shares of WPRR's Class B common stock prior to the stockholders' vote on the merger of UNS into WPRR. At the time of such stockholder vote, PACS intends to vote all shares of WPRR Class B common stock that it then owns in favor of the merger.

After obtaining the necessary stockholder approval, the merger of UNS into WPRR will be consummated. As described more fully below under "Exchange of Stock", following consummation of the merger PACS will own all the issued and outstanding shares of WPRR stock. Such WPRR shares will thereafter be contributed by PACS to UPRR. Following these transfers, UPC will directly own and exercise through PRSI control of UPRR and its rail carrier subsidiaries, and through PRSI and UPRR, control of WPRR and its rail carrier subsidiaries.

As a result of the proposed transaction, UPC, PACS, PRSI, and UPRR will also acquire control of WPX Freight System, Inc. (WPX), a wholly-owned motor carrier subsidiary of WPRR's wholly-owned subsidiary, Standard Realty and Development Company.

Exchange of Stock. At the time of merger, each issued and outstanding share of WPRR Class A and Class B common stock, except for shares owned by UPC or one of its subsidiaries, will be converted by law into the right to receive $20.00 in cash. All issued and outstanding shares of WPRR Class A or Class B common stock owned by UPC or one of its subsidiaries at the time of merger will be cancelled.[141] Finally, at the time [633] of merger, each issued and outstanding share of UNS common stock will be converted by law into one fully paid and nonassessable share of new WPRR common stock. The new WPRR common stock into which UNS common stock is to be converted at the time of merger will have a par value of $5 per share.

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[141] At present, UPC and its subsidiaries own 1,221,447 shares of WPRR Class A common stock. All these shares are currently held by a trustee in an independent voting trust established pursuant to a Voting Trust Agreement that has previously been filed with the Commission and has been approved by the Commission's staff. In addition, under a Stock Purchase Agreement PACs will acquire for $20.00 per share all issued and outstanding shares of WPRR Class B common stock prior to the merger of UNS into WPRR.

The Purchase Price. Pursuant to the terms of a tender offer dated January 23, 1980, UPC, through a wholly-owned subsidiary, purchased for $20 a share, 1,081,647 of the 1,400,000 issued and outstanding shares of Class A common stock of WPRR for $21,632,940. Such subsidiary and WPRR have entered into an Agreement of Merger providing, among other things, that if they elect, holders of WPRR Class A common stock not owned by UPC (approximately 178,553 shares) will receive an aggregate of approximately $3,571,060 at the time of the merger. In addition, such subsidiary, WPRR, and the holders of Class B common stock, have entered into a stock purchase agreement providing for the acquisition by the subsidiary of 10,000 shares of Class B common stock for $200,000. Prior to the tender offer UPRR had acquired 139,800 shares of WPRR Class A common stock at a cost of $1,734,000.

Accordingly, the aggregate value of the securities of WPRR acquired by UPC, if the merger is approved, will be $27,138,000.

Fairness of Terms. On January 21, 1980, UPC announced its intention to acquire a majority of WPRR Class A common stock through a public cash tender offer. This tender was successful and at the present time, UPC owns more than 85 percent of the issued and outstanding Class A common shares of WPRR. Shares of WPRR stock under UPC ownership are being held in an independent voting trust awaiting authority from this Commission for UPC to exercise voting control. Under the terms of the agreement of merger between WPRR and PACS, PACS will be merged into WPRR once our approval is obtained. All common shares of WPRR not owned by UPC or its subsidiaries will be converted by law into a right to receive $20 in cash per share.

The Board of Directors of WPRR used the services of the investment banking firm of Salomon Brothers to evaluate the fairness of the $20 purchase price per share offered to the stockholders of WPRR. Salomon Brothers

reviewed and analyzed the financial and operating conditions of WPRR including, among other things, audited financial statements for the five years ended December 31, 1978, and for the year ended September 30, 1979, along with other companies engaged in the railroad industry including UPC; pro forma and projected financial results of WPRR for the years 1978 through 1980; the prospective benefits to UPC from [634] acquisition of WPRR; historical and current stock market information relating to the securities of WPRR and other companies, including price-earnings ratios, dividend yields and market to book values and the nature of the market for the WPRR's Class A common stock. Salomon Brothers determined that the proposal by UPC of $20 cash per share for any and all of the outstanding shares of the WPRR Class A common stock, was fair, from a financial point of view, to holders of such common stock.

Protests to the proposed compensation offered the WPRR stockholders were filed by certain minority stockholders. One neither supports nor opposes the proposed merger, but states that the $20 per share offered for his WPRR Class A common stock is neither fair nor reasonable as required by 49 U.S.C. 11344 in that it fails to reflect the true value of WPRR based on: its assets; the best possible use of its properties; the financial statements of WPRR; the projected financial results of the Company operating data; a comparison of the $20 offered for the stock with the prices at which the stocks of comparable railroads and railroads providing service to the same general areas as WPRR; the strategic location and unique value of WPRR to UPRR or to any railroad seeking to establish a competitive rail system through the central corridor; the financial and business prospects of WPRR; the prospective benefits to WPRR from consolidation with UPRR and MPRR; the contribution which WPRR will make when consolidated with UPRR and/or

MPRR; a fair and reasonable price/earning ratio; and other relevant factors and considerations.

Another dissenting minority stockholder objects to both the merger and the $20 tender offer. He argues that UPC's offer to WPRR has the effect of taking all of the rights and equity interest away from the non-tendering stockholder and that such an action is confiscation.

He states that under the terms of the agreement any dividends paid by WPRR prior to a merger shall be deducted from the $20 tender/merger price. This provision, he says, precludes the non-tendering Class A stockholder from participating or benefitting from any increase in WPRR's equity from earnings and large property sale profits, since the tender offer was made. He further states that the UPC tender document was not only misleading and coercive, but misrepresented the facts. In his opinion, the terms of the stock exchange proposed by UPC should be changed to give the shareholder $20 cash, plus accrued earnings to date of merger (excluding extraordinary maintenance and other charges), plus a seven times multiple of 50 percent of the estimated $29.1 million economic benefits of the proposed merger.

Applicants submit that the record amply establishes that the financial terms of the UPC-WPRR consolidation are fair to the shareholders. [635] Applicants note that the tender offer of $20 per share for the outstanding Class A common stock of WPRR in January 1980, represented a premium of 92 percent over the market price of WPRR stock immediately before the negotiations for the transaction commenced. They state that the financial terms of the transaction resulted from arms' length negotiations by the primary applicants. WPRR was assisted in the negotiations by an independent investment banking firm—Salomon Brothers. In approving the UPC-WPRR transaction, the Board of Directors of WPRR had before

it the opinion of its investment banker that the financial terms of the Union Pacific tender offer are fair to WPRR shareholders. UPC states that it did not seek a fairness opinion with respect to the WPRR transaction because of the relative small size of the transaction. Applicants refer to the experts' testimony in this proceeding which, they assert, reveals that the fairness opinion was based on careful evaluations of all the relevant circumstances, including the earnings capacity of the applicants, likely merger benefits, book values and market prices of the securities involved, operating characteristics and financial positions of the applicants and market precedents in comparable transactions. UPC states that fair value for the stock has been determined by taking into consideration all the elements of value, including the nature of the enterprise, net asset value, market value, management, earnings prospects, dividend history, expenses of operation, tax considerations, and any other facts which were known or which could be ascertained as of the date of the merger which throw any light on the future prospects of the merged corporation. UPC contends, therefore, that the WPRR shareholders will, pursuant to the terms of the UPC-WPRR transaction, receive the full economic equivalent of what they now hold.

In appraising any transaction affecting the rights of stockholders, it is incumbent upon us to see that the interests of the minority stockholders are protected and that the overall proposal is just and reasonable to those stockholders, *Schwabacher* v. *United States*, 334 U.S. at 198, 201. We have a duty to see that the minority interests are protected, especially in the absence of arms' length bargaining or where terms have been imposed by management interests adverse to any class of stockholders

Various valuation methods may be used in arriving at an opinion of the fair value of the common stock. The commonly used valuation methods are the equity valua-

tion model and the capitalized earnings method. These methods are predicated on the carrier continuing as an ongoing concern.

The equity valuation model examines the future stream of dividend payments an owner of common stock might reasonably expect to receive, discounted to present value. The discounted rate would reflect the rate of [636] return an investor would require as a condition to the purchase of common stock. The capitalized earnings method reflects what an investor is willing to pay for the common stock based on all information relating to the underlying business, its earnings, and the stock market. The capitalization rate is typically referred to as the price/earnings (P/E) ratio. A low P/E ratio is a sign that a stock is not held in much esteem by investors. Conversely, a high ratio indicates that the stock is highly regarded and investors believe that the company's prospects for earnings growth justify the price of its stock.

In *Missouri Pacific Railroad Co., Securities*, 347 I.C.C. 377, we held that a railroad's earning power is the primary determinant of value and that future earnings that have a reasonable prospect of realization have an important bearing on value. See also *Seaboard Air Line R. Co.-Merger-Atlantic Coast Line*, 320 I.C.C. at 193 and *Schwabacher* v. *United States*, *supra*. Current and historic earnings may properly be considered and, with varying degrees of emphasis, future earnings may be a reliable criterion of current worth, *Consolidated Rock Co.* v. *Dubois*, 312 U.S. 510, 526 (1941). Thus, the capitalization of earnings method to determine present and prospective worth is a reasonably conventional and generally accepted method for determining the value of stock. Equity or book value is of significance only in the event of a railroad's liquidation or nationalization. Moreover, land values are of little or no significance in determining the value of stock. Even assuming that a railroad may be liquidated at some future date, the chances of stockhold-

ers recovering book value of their stock are minimal because stockholders very rarely recover book value on liquidation. Thus, with the railroad as a going concern, the rights of stockholders and the value of their respective stock is to be measured by earnings power rather than upon book value which may never be realized.

We conclude that the terms of the UPRR-WPRR transaction are just and reasonable. Considering all the evidence regarding the finances of the WPRR, with and without giving effect to the proposed consolidation, we conclude that the $20 per share offer falls within a reasonable range of values for WPRR stock to be acquired by UPRR.

WPRR's shares were listed and traded on the American Stock Exchange starting May 11, 1979. The high and low bid prices from March 28, 1979, (the date the shares became publicly traded in the over-the-counter market) through May 10, 1979, and the high and low sales prices per share since May 11, 1979, as available in published financial sources were as follows:

[637]

		High	Low
1979:	First Quarter (beginning 3-28)	$12¾	$12
	Second Quarter	14⅛	10⅜
	Third Quarter	15⅛	10⅞
	Fourth Quarter	11⅞	9¼
1980:	First Quarter (through 1-22)	19⅜	10¼

The reported last sale price of WPRR's stock on the American Stock Exchange on January 18, 1980, the last full day of trading prior to the public announcement of the proposed offer by UPC on January 21, 1980, was $14½ and the reported last sale price of the shares on January 22, 1980, was $19⅜. No dividends have ever been paid on the shares. Accordingly, the value of WPRR's stock just prior to the merger announcement

was $14.50 per share. At this point in time, the $20 tender offer represented a 38 percent premium over market.

WPRR reported 1979 earnings of $4.5 million or $3.21 a share based on a capitalization of 1.4 million outstanding shares. Dividing the $14.50 market price per share by the $3.21 earned by each share translates into a price-earnings multiple of 4.5 times.

In determining the fairness of UPC's offer, we examine the value of WPRR stock, based on the existing capital structure of about 1.4 million shares, giving effect to the merger benefits. If the indicated merger benefits are fully realized by the fifth year after the merger, WPRR's net income would increase to $11.7 million which is almost 3 times more than it earned in 1979. Assuming it still had 1.4 million shares of stock outstanding at that time it would earn some $8.34 per share which is more than double the amount earned by each share in 1979. It is probable that the increased strength that WPRR would attain by its inclusion in the UP system would enable its stock to command a higher price-earnings multiple. The multiple on UPC's shares ranged from 8.2 times to 11.5 times in the five years 1975-1979. On a 5-year average basis, UPC's multiple was 10.2 times. The multiple on UPC shares in mid-May, 1982 was 8.8 times. Thus, the market appraisal of UPC has not changed significantly since the merger announcement with WPRR. WPRR's multiple was 4.5 times in 1979. Giving consideration to the financial condition of WPRR as part of the UPRR system, WPRR's stock should be able to command a multiple nearer that of UPC after consolidation, if the stock were traded on the market. In these circumstances, a P/E multiple of about 8 times would be reasonable for WPRR stock. Applying a P/E multiple of 8 times to the projected fifth year earnings, WPRR would [638] have a market value of about $67 per share when the merger benefits have been fully realized.

In order to determine the value of the stock at the time of consummation, the $67 per share value must be discounted for a period of five years. The railroad cost of capital for the period when the tender offer was made provides an appropriate rate to be used to discount the estimated future stock price to present value. Discounting the $67 per share future value of the stock by a composite cost of capital rate of 12.1 percent [142] annually for five years yields a present value at time of consummation of $38 per share.

The difference in the market price of WPRR stock immediately prior to UPC's tender offer and the present value of the stock giving effect to the merger benefits appears to represent the premium on the present value of WPRR stock attributable to the proposed transaction. The financial expert witnesses in these proceedings have testified as to appropriate methods for allocating merger benefits between the acquiring and the acquired companies. The benefits may be allocated evenly between both parties because they are both essential to the ultimate realization of the benefits. On the other hand, the dominant partner in the merger may reasonably be able to demand most of the benefits because its strength is the real source for the consolidation producing premium values above the combined values of the two companies as separate entities.

The WPRR stock had a fair market value of $14.50 before the tender offer. The present value of that stock, giving effect to the benefits of the consolidation is about $38. Therefore, the merger premium on the stock's value is about $23.50 per share. An allocation of from 10 percent to 50 percent of the premium ($2.35 to $11.75 per share) would be fair to WPRR shareholders. Adding this range of divisions of the premium to the fair market value of WPRR stock before the tender offer produces a

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[142] Ex Parte No. 381, *Adequacy of Railroad Revenue*, 364 I.C.C. 311 (1980).

reasonable price range for the stock of $16.85 to $26.25 per share. The price of $20 per share to be paid under the merger terms falls within this range. Therefore, we conclude that the price to be paid for WPRR stock under the merger agreement is fair and reasonable.

Our analysis of the UP offer for WPRR stock shows that offer to be fair. This analysis, however, is based on the specific facts presented in this proceeding. We do not prescribe this analytical approach for general use in evaluating the fairness of terms to shareholders. The fairness to shareholders of any particular transaction must be determined on its own merits. We continue to give weight to the results of arms' length negotiations which are reached on any reasonable basis.

[639] *Securities Applications*

UPC seeks authority (1) to issue shares of UPC common and preferred stock necessary to effect the UP Subsidiary-MPC Merger; (2) to issue shares of UPC common stock as required upon conversion of UPC's new preferred stock issued in effecting that merger; and (3) to issue shares of UPC common stock as required after consummation of the merger with respect to MPC employee benefit or stock ownership plans. UPC estimates that issuance of approximately 17,334,654 shares of common stock, after giving effect to the two for one stock split that occurred on April 25, 1980, and approximately 4,333,664 shares of new preferred stock will be required to effect the merger. Conversion of the new preferred stock would require issuance of, at a maximum, approximately 8,667,327 shares of UPC common stock. UPC does not expect the number of shares issued pursuant to MPC employee benefit or stock ownership plans to be material. UPC estimates the cost of these securities issuances to be about $255,000.[143]

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[143] This total includes: $15,000 legal fees; $15,000 accounting fees; $35,000 printing costs; $175,000 exchange agent and transfer fees; and $15,000 other costs.

UPC has filed a motion to dismiss any part of its application for authority to issue securities to the extent that we lack jurisdiction or that the exercise of our jurisdiction is not necessary to assure the continued proper provision of transportation by the carriers controlled by UPC.

When we authorize a person, who is not a carrier subject to our jurisdiction to control two or more carriers which are subject to our jurisdiction, the person in control is subject as a carrier to certain provisions of the Act (including provisions governing securities issuances) to the extent we specify.[144]

UPC's securities application clearly falls within our jurisdiction. We must decide, therefore, the extent to which we should exercise our jurisdiction.

We have wide discretion in implementing our power pursuant to this provision. One test we have used to determine whether a noncarrier holding company should be subject to this provision is to examine whether the holding company is in control of carriers which by their size and the nature of their operations will have a substantial influence on national transportation, *Illinois Cent. Gulf R. Co.-Acquisition-G. M. & O. et al.*, 338 I.C.C. 805, 857 (1971).

Approval of the UPC-MPC consolidation will place UPC in control of a rail system operating over 20,000 miles of track and linking all major east-west transcontinental gateways with the Pacific Northwest and [640] southern California. This system will play a very important part in the transportation of transcontinental traffic and in providing transportation services to the South Central United States. The system will be serving growing and economically vigorous regions of the Nation and will provide crucial services transporting vital com-

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[144] 49 U.S.C. 11348(a).

modities such as grains and coal. The rail system to be created by the UPC-MPC merger will clearly have a substantial influence on the nation's transportation system.[145]

The proposed securities issuances form an essential element of the creation of this new system. Therefore, we will subject the securities issuances to our review and deny UPC's motion.

We see no point, however, in subjecting future security issues of UPC (other than those included in the instant application) to our review when such review would merely require our prior approval for investments in areas over which we have no jurisdiction and where delay caused by the necessity of obtaining approval would cause UPC (and, indirectly, its rail subsidiaries) to lose otherwise beneficial business opportunities. Because UPC and its railroad holding company subsidiary PRSI will continue to control carriers having a substantial impact on national transportation, however, we will continue to exercise some jurisdiction. Recently, we have imposed fairly uniform conditions on railroad holding companies absent special conditions such as holding company abuses. *CSX*, 363 I.C.C. at 597 and cases cited therein. We will impose similar conditions on UPC and PRSI. UPC and PRSI will be required to: (1) file annual reports on Form R-1 and to file such other periodic and special reports as we may require under 49 U.S.C. 11145; (2) comply with 49 U.S.C. 11144; and (3) file applications under 49 U.S.C. 11301 and 11302 for those issuances of securities and assumptions of obligations which may relate to or affect the activities of carrier subsidiaries.

MPC and WPRR have each filed an application seeking authority to issue 200 shares of their respective common

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[145] Inclusion of the WPRR will make this system even more influential. The proposed UPC securities issuances, however, are not related to the WPRR merger.

stock in order to effect their mergers. They expect the costs of these issuances to be nominal.

We may approve the applications of UPC, MPC, and WPRR for authority to issue securities if we find the issuances (1) are consistent with the proper performance of public transportation by the involved carriers; (2) will not impair the ability of such carriers to provide public transportation; and (3) are consistent with the public interest in other respects. 49 U.S.C. 11301. The securities issuances proposed by UPC, MPC and WPRR meet these statutory requirements and will be approved.

[641] MOTOR CARRIER APPLICATIONS

In MC-F-14448 and MC-F-14449, respectively, UP seeks authority to control WPX Freight System, Inc., and Missouri Pacific Truck Lines, Inc., the motor carrier subsidiaries of WPRR and MPRR. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the proposed transaction involves a motor carrier, we may approve and authorize the transaction only if we find that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operation, and will not unreasonably restrain competition.[146] This standard, as we have generally interpreted it, is not the basis for judging the motor carrier applications in these proceedings. Instead the public interest test used to judge the overall transaction is the proper standard.

We have stated that where a transaction involving the control of a motor carrier by a railroad, or by a railroad affiliate, results in a change only of form, rather than a change in substance, the proviso contained in 49 U.S.C. 11344(c) concerning the finding necessary in such cases

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[146] 49 U.S.C. 11344(c).

is not applicable.[147] We have also approved the merger of a motor carrier controlled by a railroad into that railroad because the railroad would carry on the motor carrier operation as presently conducted.[148] The authoized operations of WPX and Missouri Pacific Truck Lines are generally restricted to being auxiliary or supplemental to the respective train services of WPRR and MPRR. After the consolidation, those motor carriers' services will still be supplemental to train service, but they will be indirectly under the control of UP. The motor carriers will provide the same service, to, from, and between the same points. We believe that these transactions, as a result of the UP-MP-WP consolidation, are merely changes in form, not substance.

The purpose of the UP-MP-WP consolidation is to create a financially strong rail system providing high quality single-system service throughout the western United States. The control of WPX and Missouri Pacific Truck Lines by UP is only a collateral impact of the rail consolidation, and will not result in any change of the physical properties of these motor carriers, nor will it adversely affect the transportation service rendered to the public. The proposed transaction would create no new motor carrier network and there will be no adverse effect on competing motor carriers.

[642] FINDINGS

In Finance Docket No. 30,000, subject to the terms and conditions discussed above, we find (a) that the acquisition by Union Pacific Corporation, Pacific Rail System, Inc., and Union Pacific Railroad Company of control of

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[147] *BN Frisco*, 360 I.C.C. at 958 and *New York Central R. Co. (Delaware) Merger*, 312 I.C.C. 417, 419 (1961). *See also, Atchison, T. & S.F. Ry. Co.-Control-Santa Fe Trail Transp.*, 15 M.C.C. 469, 472 (1938) and *Greyhound Mergers, 1936*, 1 M.C.C. 342, 351 (1936).

[148] *McCloud River R. Co.-Merger*, 1 M.C.C. 354, 356 (1936).

the Missouri Pacific Corporation and Missouri Pacific Railroad Company and its rail carrier subsidiaries through the proposed transaction is within the scope of 49 U.S.C. 11343, is consistent with the public interest and will not adversely affect the adequacy of transportation to the public; (b) that failure to include other railroads in the area involved in the transaction will not adversely affect the public interest; (c) that the transaction will not result in any guaranty or assumption of payment of dividends or of fixed charges or any increase in fixed charges; (d) that the interests of employees affected by the proposed transaction will be adequately protected by the conditions imposed herein; (e) that the transaction will not significantly reduce competition in any market; and (f) that the terms of the transaction are just and reasonable.

In Finance Docket No. 30,000 (Sub-No. 1), subject to the terms and conditions discussed above, we find (a) that the acquistion by Union Pacific Corporation, Pacific Rail System, Inc., and Union Pacific Railroad Company of control of Western Pacific Railroad Company and its rail carrier subsidiaries through the proposed transaction is within the scope of 49 U.S.C. 11343, is consistent with the public interest and will not adversely affect the adequacy of transportion to the public; (b) that failure to include other carriers in the area involved in the transaction will not adversely affect the public interest; (c) that the transaction will not result in any guaranty or assumption of payment of dividends or of fixed charges or any increase in fixed charges; (d) that the interests of employees affected by the proposed transaction will be adequately protected by the conditions imposed herein; (e) that the transaction will not significantly reduce competition in any market; and (f) that the terms of the transaction are just and reasonable.

In Finance Docket No. 30,000 (Sub-No. 2) we find that the proposed issuance of securities (a) is consistent

with the proper performance of transportation by the carriers to be controlled by Union Pacific Corporation; (b) will not impair the ability of the controlled carriers to provide public transportation; (c) otherwise is consistent with the public interest; and (d) is for a lawful object within the corporate purpose of Union Pacific Corporation and is reasonably appropriate for that purpose.

In Finance Docket No. 30,000 (Sub-No. 3), we find that the proposed issuance of securities (a) is consistent with the proper performance of transportation by the carriers controlled by Missouri Pacific Corporation; [643] (b) will not impair the ability of the controlled carriers to provide public transportation; (c) otherwise is consistent with the public interest; and (d) is for a lawful object within the corporate purpose of Missouri Pacific Corporation and is reasonably appropriate for that purpose.

In Finance Docket No. 30,000 (Sub-No. 4), we find that the proposed issuance of securities (a) is consistent with the proper performance of transportation by the Western Pacific Railroad Company and by the carriers it controls; (b) will not impair the ability of Western Pacific Railroad Company or the carriers it controls to provide public transportation; (c) otherwise is consistent with the public interest; and (d) is for a lawful object within the corporate purpose of Western Pacific Railroad Company and is reasonably appropriate for that purpose.

In Finance Docket No. 30,000 (Sub-Nos. 5, 6 and 7), we find (a) that the proposed acquistions of trackage rights are transactions within the scope of 49 U.S.C. 11343, are consistent with the public interest and will not adversely affect the adequacy of transportation to the public; (b) that the transactions will not result in any guaranty or assumption of payment of dividends or of fixed charges or any increase in fixed charges; (c) that

no other railroad has requested to be included in the transactions; (d) that the interests of employees affected by the trackage rights will be adequately protected by the conditions imposed; and (e) that the terms of the transactions are just and reasonable.

In Finance Docket No. 30,000 (Sub-Nos. 8, 9, and 10) we find that, because of our approval of the control applications, an actual competitive relationship between applicants will no longer exist and, thus, we do not have jurisdiction over the proposed pooling agreements pursuant to 49 U.S.C. 11342.

In MC-F-14448, we find that the acquistion by Union Pacific Corporation, Pacific Rail System, Inc., and the Union Pacific Railroad Company of control of WPX Freight System, Inc., through control of Western Pacific Railroad Company, is consistent with the public interest and will enable the applicants to use motor carrier transportation to public advantage in their operations, and will not unduly restrain competition.

In MC-F-14449, we find that the acquistion by Union Pacific Corporation, Pacific Rail System, Inc., and Union Pacific Railroad Company of control of Missouri Pacific Truck Lines, Inc., through control of Missouri Pacific Corporation and Missouri Pacific Railroad Company, is consistent with the public interest and will enable the applicants to use motor carrier transportation to public advantage in their operations, and will not unduly restrain competition.

[644] In Finance Docket No. 30,000 (Sub-Nos. 14, 15, 20, 21, 22, 23, 24, 33, 34, 36, 37, 39, 40, and 41),[149] we find that imposition of the proposed trackage rights and terminal operations, as conditions to approval of the

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[149] Finance Docket No. 30,000 (Sub-Nos. 11, 12, and 13) were not assigned to any applications and have not been used in these proceedings. The trackage rights applications in Finance Docket No. 30,000 (Sub-Nos. 19, 35, 38, and 42) have been withdrawn.

primary transactions is not consistent with the public interest.

In Finance Docket No. 30,000 (Sub-Nos. 16, 17, 18, 25, 26, 27, 28, 29, 30, 31, 32, and 43), we find that imposition of the proposed trackage rights, terminal use operations, and pooling agreement as conditions to approval of the primary transactions is consistent with the public interest. We further find that the proposed acquisition of trackage rights are transactions within the scope of 49 U.S.C. 11343; are consistent with the public interest and will not adversely affect the adequacy of transportation to the public; that the transactions will not result in any guaranty or assumption of payment of dividends or of fixed charges or any increase in fixed charges; that no other railroad has requested to be included in the transactions; and that the interests of employees affected by the trackage rights will be adequately protected by the conditions imposed. If the carriers cannot agree upon the conditions and compensation for the trackage rights, we will establish just and reasonable conditions and compensation. We further find that the proposed use of terminal facilities are transactions within the scope of 49 U.S.C. 11103, will be practicable and in the public interest, and will not substantially impair the ability of any of the rail carriers owning or entitled to use of the facilities to handle their own business. If the carriers cannot agree upon the conditions and compensation for use of the facilities, we will establish the conditions and compensation under the principles controlling compensation in condemnation proceedings. We find that the imposition of the proposed trackage rights and terminal use operations as conditions to the primary transactions will ameliorate anticompetitive harms otherwise arising from the transactions, will be operationally feasible, and will produce public benefits outweighing their harms to the transactions. We find that the proposed pooling operations are within the scope of 49 U.S.C.

11342, will be in the interest of better service to the public and of economy of operation, will not unduly restrain competition, and that the terms of the pooling agreement are just and reasonable. The interests of employees affected by the pooling agreement will be adequately protected by the conditions imposed.

We find that the terms of section 4(b) of the settlement between primary applicants and Chicago & North-Western Transportation Company are operationally feasible, will not detract from the benefits of the primary transactions, and are consistent with the public interest. [645] We find that the "Bieber" conditions (7 and 9-18) imposed in *Great Northern Pac.-Merger-Great Northern*, 331 I.C.C. 228, because of changed circumstances if these transactions are consummated, will no longer be in the public interest.

We find that a five-year option for inclusion of the City of Prineville Railroad in the consolidated system is not in the public interest.

We find that the other conditions requested by SP, BN, DRGW, MKT, KCS, ICG, Milwaukee Road, Soo Line, the Water Transport Association, the Board of Trade of Kansas City, Missouri, Inc., and any other parties are not in the public interest.

We find that this action will not significantly affect the quality of the human environment. We also find that any effect on the conservation of energy resources will be beneficial.

CHAIRMAN TAYLOR concurring:

I endorse completely our decision to approve the primary and related applications with appropriate conditions, thereby allowing this consolidation to go forward. With this decision, I believe the Commission has given sanction to an important private sector proposal that

should substantially enhance efficiency and competition while providing improved service to shippers.

However, in my opinion, there are two limited instances where the approved conditions do not go far enough to ameliorate anticompetitive consequences of the consolidation. More specifically, we should have granted the requested MKT trackage rights between San Antonio and Corpus Christi, and we should have imposed a limited rate condition allowing the BN to quote rates over the MP for movements of coal to five existing power plants.

The MKT request for trackage rights to Corpus Christi is supported by the Departments of Transportation and Agriculture and by a number of affected shippers. Approval of these rights would insure MKT's continued ability to participate in traffic moving to or from Mexico. MP has been MKT's traditional connection for traffic to Mexico, but applicants have acknowledged that as a result of the consolidation, more emphasis will be placed on the MP-UP connection. MP may not continue to cooperate in MKT interchange traffic.

While interchange with SP at Denison, TX is available, historically this has not been a good alternative, because SP has shown no interest in handling this traffic. Imposition of the trackage rights to Corpus Christi would provide MKT direct access to TM for service to Mexico, as well as access to the Gulf at Corpus Christi.

[646] Moreover, the San Antonio-Corpus Christi trackage rights would involve only minimal operating problems. Applicants' own operating plan shows a decrease of traffic into San Antonio and Corpus Christi, and MKT requested the use of only two of MP's tracks at the Viola Yard in Corpus Christi, which could be changed from day to day at applicants' discretion. The carriers also could negotiate the construction of tracks, if necessary, or MKT could make use of other tracks in Viola Yard.

I am also concerned over the failure of the Commission to preserve the potential for competition on Powder River Basin coal movements to five existing power plants located on the MP. We authorized the entrance of the CNW into the Powder River Basin in anticipation that CNW and UP would cooperate in the movement of coal and create a potential for origin competition between the existing BN service and the approved CNW-UP service. The expectation of this competition now exists for movements of coal at least as far east as Kansas City, the eastern terminus of the UP. Coincidentally, Kansas City is also the present interchange point for BN-MP joint line service to the five power plants.

The decision here asserts that the five specific utilities will be able to negotiate in the same manner with the consolidated system as they might presently with the individual carriers, and that as a result, no competitive loss will occur because of the consolidation. But applicants themselves have conceded that once the consolidation is approved, BN will be able to compete on coal moving from the Powder River Basin to the MP-served utilities only if MP is willing to compete against itself. The Department of Transportation also recognized this problem in its support of the BN trackage rights, and even the Department of Justice did not oppose imposition of those rights. The Commission should preserve the opportunity for competition from the Powder River Basin.

Unfortunately, the operating problems resulting from a grant of the BN trackage rights would weigh heavily against the public benefits of the consolidation. Therefore, I favor the imposition of a limited rate condition allowing BN to quote rates for the joint line movement of coal over the MP to the five existing utilities, but not to any other utility plants that may be subsequently located along the MP line.

As with the proposed trackage rights, the limited rate condition would take effect only upon CNW's entrance

into the Powder River Basin. Unlike the trackage rights, the condition would not be overly burdensome on the MP, but would result in preserving the potential for competition in coal transportation to the five utility plants.

There remains only one other matter that deserves attention. Although I agree that changed circumstances make a review of the Bieber conditions advisable, that review should take place in a reopened [647] *Northern Lines* proceeding, the case in which those conditions were imposed.[150] In my opinion, this proceeding does not constitute the proper vehicle for removing the conditions.

VICE CHAIRMAN GILLIAM, concurring:

As the senior member of this Commission, I have participated in every major rail related proceeding since enactment of the Staggers Rail Act in 1980. I have carefully assessed and evaluated the rail modernization trend that began with the Staggers Act and was followed by the CSX decision, the Rail Merger Policy Statement, the Traffic Protective Conditions Rulemaking, the Norfolk Southern Case, both Guilford acquisitions as well as countless other smaller proceedings.

I have concluded that the UP/MOPAC decision is the culmination of the first phase of a fundamental reordering and modernization of the railroad industry. The modernization trend exemplified by this decision has *three* specific ramifications that I wish to articulate at this time:

1. We are clearly and irreversably embarked upon a new era of total transportation companies which will soon have capacities to provide regional and transcontinental freight hauls under single system networks.

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[150] The Commission followed a similar procedure in *Soo Line R. Co.—Petition for Exemption*, 366 I.C.C. 286 (1982) which dealt with an exemption petition under 49 U.S.C. 10505 for a transaction proposed under 49 U.S.C. 11344(d).

These new consolidated systems promise to be forerunners of integrated transportation networks which will embrace all modes (rail, motor, air, water). These new systems will spawn a new generation of intermodal technologies and equipment development as well as innovative market, pricing and service strategies. Strengthened, modernized systems and single system national transportation companies will radically alter traditional competitive relationships between rail and motor modes.

2. Large scale combinations of the type we have approved today will stimulate intense rail competition which will inevitably lead to further consolidation attempts by other carriers in order to competitively respond to these new systems. Specifically, I would not be surprised to see Santa Fe, SP, DRGW and others move rapidly toward other transportation combinations and acquisitions as a matter of competitive strategy. Similary, [sic] I would not be surprised to see the new large eastern systems soon move to establish relationships with the western systems. Nor would it be surprising to see formerly conservative railroad management become actively involved in acquisitions of motor carrier companies and airlines. Such is the nature of healthy dynamic business competition. In short, U.S. freight transportation is posed to undergo dramatic change and this decision is symbolic of that change.

[648] Under no circumstances should today's merger be viewed as a product of today's weak economy. Indeed the long-term competitive benefits of this decision will become *most* apparent in a revived economy.

3. This decision is a benchmark in terms of the federal relationship to the railroad industry. As evidenced by this case, railroad management and initiative is appropriately assuming primary responsibility for the structure, operations and pricing mechanisms of the new system. The Commission's role as demonstrated by its limited used [sic] of its conditioning power in this case is to guard

against abuse of market power and potential monopolistic activity. If future Commissions are lax in this necessary but limited role, there will be inevitable calls for the resurgence of regulation. Such a development would quickly nullify many of the modern public benefits and freedoms promised by this and other mergers.

In this decision, I am pleased to say we have appropriately exercised this role by imposing limited but carefully designed conditions that foster essential regional and transcontinental competition.

Throughout this proceeding, I have been particularly concerned that the SP, DRGW and Santa Fe remain strong viable carriers. Today's decision ensures competitive opportunities for these roads. I have personally inspected portions of all three of their systems and met many of their top management. I feel confident that SP and DRGW will utilize the conditions granted in this decision in ways that maintain and improve their competitive positions. I am equally confident that the Sante [sic] Fe will continue to utilize its physically advantageous right of way and press forward with its outstanding new intermodal technologies and exceptionally speedy, efficient transit times from the midwest to the West Coast and back. If it does, it will provide extremely strong competition for the new system to the great benefit of the public.

In sum, this merger is an affirmation of the national consensus for reduced railroad regulation and increased private sector initiative. The clear message of this decision is that the transportation industry is undergoing a fundamental change and that the era of total coordinated transportation networks has arrived.

I should add, however, that I have serious reservations concerning the Commission's adjudication of the fairness of UP's offer to the holders of the 13 percent untendered WPRR common stock. I believe such controversies regarding stock evaluation are best left to negotiations

between the affected shareholders and corporate entities and, where the parties cannot agree, to adjudication in the courts. The private sector, not the Commission, is the appropriate forum for resolving these issues. Moreover, I [649] believe once the Commission has approved control, it should not intervene in future capital or corporate structure changes that have no bearing on significant transportation matters.

Unfortunately, an option which was not seriously considered in this case was (1) approval of only the control of WPRR by UP through its current 87 percent stock ownership; and (2) exemption from regulation under 49 U.S.C. 10505 of the WPRR merger into a UPRR subsidiary. This way, UP andw WPRR could still consummate the proposed merger, but dissenting shareholders would be free to contest the stock valuation in an appropriate judicial forum.

In sum, in future consolidation proceedings I would strongly encourage the Commission to approve only those elements of the proposed transaction which are necessary to effect the consolidation. All other corporate and stock related elements of the transaction, to the extent they can be handled separately and they do not raise significant transportation matters, should be exempt from regulation. In this manner, responsibility for nontransportation matters will appropriately be left with the affected parties and the courts.

COMMISSIONER SIMMONS, concurring:

I join in the Commission's decision to approve, with conditions, the consolidation of the Union Pacific, Missouri Pacific, and Western Pacific rail systems. The record amply demonstrates that the consolidation will bring significant cost savings and service improvements to the merged system and the shippers it serves. It also demonstrates that to the extent the consolidation threatens

competition or the provision of essential services, it does so in individual corridors and markets, thus permitting us to craft corrective conditions. Our grant of trackage rights conditions to DRGW and SP/SSW in the central corridor, and to MKT north of Kansas City, go a long way toward eliminating the possible adverse effects I see from this consolidation.

I would, however, have imposed two additional conditions to ameliorate potential anti-competitive effects of the consolidation.

First, I would have imposed the trackage rights requested by MKT over MP's line between San Antonio and Corpus Christi, TX. The record shows that, after consolidation, applicants are likely to downgrade the MKT-MP interchange both for Mexican traffic via the Laredo gateway and for traffic moving via the port of Corpus Christi. Moreover, the only viable routing that would permit MKT to compete for this traffic independent of MP—interchange with SP at Denison, TX—is clearly unsatisfactory: it would substitute an unwieldy 3 line haul (MKT-SP- [650] TM) for MKT's current 2 line haul to Laredo, and it would leave MKT with an interchange partner, SP, which has shown no interest in developing interchange traffic to either Laredo or Corpus Christi. A grant of MKT's trackage rights request to Corpus Christi would restore its ability to compete for Traffic both to that port and, in joint line service with TM, to Mexico.

Second, I would have imposed a limited ratemaking condition requiring MP to concur with BN on joint rates on coal routed via Kansas City to power plants at Oologah, OK, Nearman, KS, Fort Gibson, OK, White Bluff, AR, and Newark, AR.[151] Absent this condition,

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[151] In the absence of this ratemaking condition, I would have supposed a grant of BN's proposal for trackage rights to the Oklahoma Gas & Electric Company's plant at Fort Gibson, OK. These rights

the utilities operating these plants will remain subject to a railroad monopoly on coal moving from the Poweder [sic] River Basin—even after CNW begins competitive service there.

My colleagues all recognize that these five utilities will be subject to the monopoly power of the consolidated system; they merely find that this monopoly power was not caused by the consolidation. They believe that MP holds its monopoly power because it is the only carrier serving each power plant, and that MP does not gain any increased monopoly power when it obtains access to the coal mines serving those plants.

Most of the utilities' plight does indeed come from their complete dependence on MP for coal deliveries. I am nonetheless convinced, as was the Department of Transportation, that in the absence of the UP-MP consolidation these utilities would be able to gain some benefit from the competition CNW/UP will bring to coal origins in the Powder River Basin. Accordingly, it would be appropriate to impose a limited ratemaking condition that would protect that benefit without imposing an undue burden on the consolidated system.

Finally, I agree with Chairman Taylor that review and removal of the Bieber route condition could better be accomplished in a reopened *Northern Lines* proceeding than in this case.

COMMISSIONER ANDRE, dissenting:

Railroad regulation by the Federal Government is in the process of profound change. I have always believed that the price system operating in conjunction with the institution of private property is the fundamental dynamic of economic progress, and particularly as it relates

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were supported by OG&E and did not present the operational problems of BN's other trackage rights requests.

to the allocation of capital. While this view would have been antagnostic to regulatory practice as recently as a decade ago, it is thoroughly consistent with the [651] Railroad Revitalization and Regulatory Reform Act of 1976 and the Staggers Rail Act of 1980. Taken together, these laws do much to shift the burden of persuasion onto those who would interpose civil government between railroad owners and their customers.

The legislatively preferred solutions to transportation problems are now those of the private sector. Unfortunately, the identification of private sector solutions is more difficult than the affirmation of their desirability. The combination of the Union Pacific, Missouri Pacific and Western Pacific railroads is a case in point. Much has been made of the private sector origin of this proposal. This acclaim is reiterative of that given other recent mergers. They have all been said to be private initiatives which open new markets, guarantee improved single-line service, and achieve efficiencies without abandoned lines or competitive loss. Little but the names need to be changed to recall the Burlington Northern and St. Louis-San Francisco merger, or the births of CSX and the Norfolk Southern. Whether Pacific Rail is the last of the end-to-end wave remains to be seen.

In 1977, before all this got under way, the Interstate Commerce Commission began a nationwide study of railroad mergers conducted by the Rail Services Planning Office. While the Planning Office gave obligatory acknowledgement to the need for private initiative and the failure of earlier government planners, the substance of their mission remained clear:

> The purpose of the study is to review the advantages and disadvantages of such arrangements, to identify the principal problems involved and to propose solutions * * *. The results of the study are expected to permit the Commission to develop criteria which can

be applied in determining if carrier consolidation proposals are in the public interest. (Rail Merger Study, Initial Paper, page one, April 15, 1977; I.C.C. Rail Services Planning Office.)

In 1978 the Planning Office issued its final report. The critical points can be summarized from the report itself:

> The Office principally recommends that the Commission issue a policy statement:
>
> (1) Encouraging rail restructuring through the merger process * * *.
>
> (2) Recognizing that end-to-end mergers generally provide potential for greater long-term advantages with fewer risks than parallel mergers.
>
> (Rail Merger Study, Final Report, page one, February 1, 1978.)

The rest is history. The intentions of the original report have now materialized and the end-to-end preference of the final report has been dutifully followed in every successful merger since. The one challenge that arose, a proposal to combine the Southern Pacific and the Santa Fe, [652] was effectively discouraged by the Commission and other government agencies. The Southern Pacific and Santa Fe abandoned their proposal during the same week in September of 1980 in which the Union Pacific filed its applications.

The Rail Merger Study would be benign enough if there were guarantees that the marketplace was itself inexorably headed toward end-to-end restructuring. But the Southern Pacific-Santa Fe proposal attests that that was not the case. Not surprisingly so, since for every persuasive argument about revitalized marketing and single-line efficiency, there is an equally plausible argument about the elimination of redundant capacity and

the economies of high utilization. Left to its own direction, the marketplace was headed toward an amalgam.

What is equally troubling is that the timing of the marketplace has been irrevocably upset. No one can know what the order of things would have been had the government simply announced that all mergers were considered neutral relative to the public interest. Arguably, extensive end-to-end mergers could have provoked defensive parallel mergers by the less fortunate. Perhaps different regions of the country would have produced different patterns altogether. Whatever the results, it is completely beyond reason to believe that they would have been identical to those produced by the carefully guided policy of government-initiated private initiative, which, though a contradiction in terms, is what actually has transpired.

The saddest part of this whole affair is the answer to the question why. Why has the Interstate Commerce Commission mandated one type of combination over another? There are several factors to any complete answer, but the one that attracts the most intellectual respect currently, and is the most influential, is competition.

Through flawed analysis of static modeling, parallel mergers are seen as potentially anti-competitive. Where there were two before, there remains only one. Despite the overwhelming dynamism in freight transportation produced by competing modes, competing geographic sources, product substitutes, and the progress of technology, the prejudice against parallel mergers endures and continues to distort capital allocation.

Unless the Interstate Commerce Commission takes some affirmative measures to renounce the elaborate signalling of the past several years, it cannot endorse those mergers brought to it hailing them as private initiatives, nor can it disclaim responsibility for the discouraging impact

its policies have had on the full and free consideration by other rail owners of rational opportunities for the deployment of their capital.

[653] *It is ordered*:

(1) In Finance Docket No. 30,000 and Finance Docket No. 30,000 (Sub-No. 1), the applications, subject to the imposition of conditions as discussed in the decision, are approved.

(2) In Finance Docket No. 30,000, the authorized transactions are subject to the following environmental conditions:

(a) The siding to be constructed near Denmon, NE by Union Pacific Railroad must meet the same capacity for flood flow as the adjacent existing track.

(b) Any contract for sale of Missouri Pacific Railroad's depot at Topeka, KS, and freight house at Omaha, NE, shall include the following terms:

(i) Purchasers of the properties must submit plans for future use of the properties, including historic structures, to the Commission and to the Advisory Council on Historic Preservation.

(ii) In the event the historic structures are demolished, the purchaser will, prior to demolition, ensure that appropriate measures are taken to record adequately the structure according to standards prescribed by the Historic American Engineering Record and Historic American Buildings Survey.

(3) In Finance Docket No. 30,000 (Sub-No. 2), the issuances by Union Pacific Corporation of (1) its common stock and new $7.50 convertible preferred stock as appropriate to effect the merger of Missouri Pacific Corporation and UP Subsidiary Corporation; (2) of its common stock as necessary upon conversion of the convertible preferred stock authorized here to be issued; and

(3) of its common stock, as necessary after the Missouri Pacific Corporation-UP Subsidiary Corporation merger, with respect to Missouri Pacific Corporation employee benefit and stock ownership plans, are approved.

(4) In Finance Docket No. 30,000 (Sub-No. 3), the issuance by Missouri Pacific Corporation of 200 shares of its common stock to effect its merger with UP Subsidiary Corporation is approved.

(5) In Finance Docket No. 30,000 (Sub-No. 4), the issuance by Western Pacific Railroad Company of 200 shares of its common stock to effect its merger with Union Subsidiary, Inc., is approved.

(6) Except as authorized and set forth in the decision, no security or stock shall be sold, pledged, repledged, or otherwise disposed of by applicants unless and until approved by the Commission.

(7) Applicants shall report concerning the matters involved in Finance Docket No. 30,000 (Sub-Nos. 2, 3, and 4) as required by the regulations at 49 CFR 1115.6.

(8) In Finance Docket No. 30,000 (Sub-Nos. 2, 3, and 4), the Commission reserves the right to make any supplemental decision it finds necessary pursuant to 49 U.S.C. 11301.

[654] (9) Nothing in this decision shall be construed to imply any guaranty or obligation on the described securities by the United States.

(10) In Finance Docket No. 30,000 (Sub-Nos. 5, 6, and 7), the applications to acquire trackage rights are approved.

(11) In Finance Docket No. 30,000 (Sub-Nos. 8, 9, and 10), the pooling applications are dismissed.

(12) In Nos. MC-F-14448 and MC-F-14449, the applications are approved.

(13) In Finance Docket No. 30,000 (Sub-Nos. 14, 15, 20, 21, 22, 23, 24, 33, 34, 36, 37, 39, 40, and 41), the applications are denied.

(14) In Finance Docket No. 30,000 (Sub-Nos. 16, 17, 18, 25, 26, 27, 28, 29, 30, 31, and 32), the applications to acquire trackage rights, to the extent and under terms and conditions discussed in the decision, are approved.

(15) In Finance Docket No. 30,000 (Sub-Nos. 19, 35, 38, and 42), the applications are dismissed.

(16) In Finance Docket No. 30,000 (Sub-No. 43), the proposed pooling operations are approved and authorized.

(17) All authority granted in Finance Docket No. 30,000 and in Finance Docket No. 30,000 (Sub-Nos. 1, 5, 6, and 7) is subject to the conditions for the protection of employees enunciated in *New York Dock Ry.—Control —Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), unless an agreement is entered prior to consolidation, in which case protection shall be at the negotiated level (subject to our review to assure fair and equitable treatment of affected employees).

(18) The trackage rights authority granted in Finance Docket No. 30,000 (Sub-Nos. 5, 6, and 7) is subject additionally to the imposition of employee protective conditions to the extent specified in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653, 664 (1980).

(19) The trackage rights authority granted in Finance Docket No. 30,000 (Sub-Nos. 16, 17, 18, 25, 26, 27, 28, 29, 30, 31, and 32) and the pooling authority granted in Finance Docket No. 30,000 (Sub-No. 43) are subject to the imposition of employee protective conditions to the extent specified in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified by

Mendocino Coast Ry., Inc.—Lease and Operate, 360 I.C.C. 653, 664 (1980).

(20) If the authority granted in this decision is not exercised within one year from the effective date of the decision, it shall be of no further effect.

[655] (21) If the applicants consummate the approved transactions, they shall confirm in writing to the Commission within 15 days after consummation, the date of consummation. Where appropriate, applicants shall submit to the Commission three copies of the journal entries recording the consummation of the transactions.

(22) All notices to the Commission as a result of any authorization shall refer to this decision by date of decision and docket number.

(23) No change or modification shall be made in the terms and conditions approved in the authorized applications without the prior approval of the Commission.

(24) This decision shall be effective 30 days from the date of service.

(25) The requirement of an initial decision is waived pursuant to 49 U.S.C. 11345(e). The decisions embraced here are final decisions within the meaning of 49 U.S.C. 10327. Any administrative appeal will be entertained only under 49 U.S.C. 10327(g), which permits appeal only on the basis of material error, new evidence, or substantially changed circumstances.

By the Commission, Chairman Taylor, Vice Chairman Gilliam, Commissioners Sterrett, Andre, Simmons, and Gradison. Chairman Taylor, Vice Chairman Gilliam, and Commissioner Simmons concurred with separate expressions. Commissioner Andre dissented with a separate expression.

AGATHA L. MERGENOVICH,
Secretary.

[SEAL]

APPENDIX A

Abbreviations Used in this Decision

Railroads and affiliates:

ALM—Arkansas & Missouri Railway Company

ATSF or Santa Fe—Atchison, Topeka and Santa Fe Railway Company

BN—Burlington Northern Inc. and Burlington Northern Railroad Company

BO—Baltimore and Ohio Railroad Company

CCT—Central California Traction Company

CNW—Chicago and North Western Transportation Company

COP—City of Pineville Railway

CP—Canadian Pacific Ltd.

CR or Conrail—Consolidated Rail Corporation

CS—Colorado and Southern Railway Company

DRGW—Denver & Rio Grande Western Railroad Company

DTI—Detroit, Toledo & Ironton Railroad Company

[656] *Abbreviations Used in this Decision—Continued*

Railroads and affiliates:—Continued

FWD—Forth Worth and Denver Railway Company

GNA—Graysonia, Nashville & Ashdown Railroad Company

ICG—Illinois Central Gulf Railroad Company

IT—Illinois Terminal Railroad Company

KCS—Kansas City Southern Railway Company and Louisiana and Arkansas Railway Company

L&A—Louisiana and Arkansas Railway Company

MILW or Milwaukee Road—Chicago, Milwaukee, St. Paul and Pacific Railroad Company

MKT or KATY—Missouri-Kansas-Texas Railroad Company

MP—Missouri Pacific Corporation and Missouri Pacific Railroad Company

MPC—Missouri Pacific Corporation

MPRR or MP—Missouri Pacific Railroad Company

MRTC—Mississippi River Transmission Company

NW—Norfolk and Western Railway Company

PACS—Pacific Subsidiary, Inc.

PLE—Pittsburgh & Lake Erie Railroad Company

PRSI—Pacific Rail System, Inc.

RI or Rock Island—Chicago, Rock Island & Pacific Railroad Company, Debtor

RSP—Roscoe, Snyder & Pacific Railway Company

SLSF or FRISCO—former St. Louis-San Francisco Railway Company

SN—Sacramento Northern Railway

SOU—Southern Railway System

SP—Southern Pacific Transportation Company and St. Louis Southwestern Railway Company

SPT—Southern Pacific Transportation Company

SSW—St. Louis Southwestern Railway Company

T-M or TEX-MEX—Texas-Mexican Railway Company

UNS—Union Subsidiary, Inc.

UP—Union Pacific Corporation, Pacific Rail System, Inc., and Union Pacific Railroad Company

UPC—Union Pacific Corporation

UPRR—Union Pacific Railroad Company

UPS or UP Subsidiary—UP Subsidiary Corporation

WM—Western Maryland Railway

WP or WPRR—Western Pacific Railroad Company

Other abbreviations used:

AQCR—Air Quality Control Region

ATDA—American Train Dispatchers Association

BLE—Brotherhood of Locomotive Engineers

BMWE—Brotherhood of Maintenance of Way Employees

BRC—Brotherhood of Railway Carmen

CALT—California Department of Transportation

CLO—Certain Labor Organizations

COFC—Container-on-flatcar

[657] *Abbreviations Used in this Decision—Continued*

Railroads and affiliates:—Continued

CPVC—People of the State of California and California Public Utilities Commission

DOA—United States Department of Agriculture

DOJ—United States Department of Justice

DOT—United States Department of Transportation

EA—Environmental Assessment

EEB—Energy and Environment Branch

EPACA—Energy Policy and Conservation Act

4R Act—Railroad Revitalization and Regulatory Reform Act of 1976

GM—General Motors Corporation

IP—International Paper Company

KCBT or Board—Kansas City Board of Trade

NEPA—National Environmental Policy Act of 1969

ORDOJ—Oregon Department of Justice

OPUC—Oregon Public Utility Commission

OSC—Office of Special Counsel

PRB—Powder River Basin

SCNA—Sierra-Curtis Neighborhood Association

SMS—Study Movement Sheets

STCC—Standard Transportation Commodity Code

TOFC—Trailer-on-flatcar

TR—Transcript

USS—United States Steel Corporation

WTA—Water Transport Association

WUTC—Washington Utilities and Transportation Commission

Frequently cited cases:

BN-Frisco: Burlington Northern, Inc.—Control & Merger—St. L., 360 I.C.C. 788 (1980)

Brown Shoe: Brown Shoe Co. v. *United States*, 370 U.S. 294 (1962)

Central Pacific: Central Pac. Ry. Co. Control, 76 I.C.C. 508 (1923), 317 I.C.C. 469 (1962), 328 I.C.C. 345 (1966)

Connector Line: Chicago & N.W. Transp. Co.—Construction, 363 I.C.C. 906 (1981)

CSX: CSX Corp.—Control—Chessie and S.C.L.I., 363 I.C.C. 518 (1980)

McLean: McLean Trucking Co. v. *United States*, 321 U.S. 67 (1944)

New York Dock: New York Dock Ry.—Control—Brooklyn Eastern District, 360 I.C.C. 60 (1979), *aff'd New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979)

Norfolk Southern: Norfolk Southern Corp.—Control—Norfolk & W. Ry., 366 I.C.C. 171 (1982)

Railroad Consolidation Procedures: Railroad Consolidation Procedures, 363 I.C.C. 784 (1981), 366 I.C.C. 75 (1982)

Traffic Protective Conditions: Traffic Protective Conditions, 366 I.C.C. 112 (1982)

Tucumcari: St. Louis S.W. Ry.—Pur.—Rock Island (Tucumcari), 363 I.C.C. 319 (1980)

[658] APPENDIX B

Related applications

FINANCE DOCKET NO. 30,000 (SUB-NO. 2)

APPLICATION OF UNION PACIFIC CORPORATION UNDER 49 U.S.C. § 11301 FOR AUTHORITY TO ISSUE SECURITIES

UPC seeks authority under 49 U.S.C. 11301, to the extent that the Commission may require it to obtain such authority pursuant to 49 U.S.C. 11348:

(a) to issue the shares of its Common Stock ("Common Stock") and a new series of $7.25 Convertible Preferred Stock ("Convertible Preferred Stock") required to be issued under the terms of the Agreement and Plan of Reorganization dated as of February 12, 1980 among

UPC, UP Subsidiary Corporation ("UPS") and Missouri Pacific Corporation ("Agreement and Plan of Reorganization") and the related Agreement of Merger dated as of February 21, 1980 between UPS and MPC ("Agreement of Merger") in order to consummate the merger of UPS with MPC (the "Merger");

(b) to issue the shares of its Common Stock that will be required to be issued upon any conversions of the shares of the Convertible Preferred Stock; and

(c) to issue any shares of its Common Stock that may be required to be issued after consummation of the Merger with respect to MPC employee benefit or stock ownership plans.

FINANCE DOCKET NO. 30,000 (SUB-NO. 3)

APPLICATION OF MISSOURI PACIFIC CORPORATION UNDER 49 U.S.C. § 11301 FOR AUTHORITY TO ISSUE SECURITIES

Applicant seeks authority under 49 U.S.C. 11301 to issue 200 shares of common stock, par value $5 per share, pursuant to the terms of the Agreement and Plan of Reorganization dated as of February 12, 1980 among Applicant, Union Pacific Corporation and UP Subsidiary Corporation and the related Agreement of Merger among Applicant and UPS, in order to consummate the merger of UPS with Applicant.

FINANCE DOCKET NO. 30,000 (SUB-NO. 4)

APPLICATION OF WESTERN PACIFIC RAILROAD COMPANY UNDER 49 U.S.C. § 11301 FOR AUTHORITY TO ISSUE SECURITIES

Applicant seeks authority under 49 U.S.C. 11301 to issue 200 shares of common stock (Common Stock) pursuant to the terms of an Agreement of Merger (Merger Agreement) entered into on January 22, 1980, among Applicant, Pacific Subsidairy, Inc., and Union Subsidiary, Inc.

[659] FINANCE DOCKET NO. 30,000 (SUB-NO. 5)

UNION PACIFIC RAILROAD COMPANY—TRACKAGE RIGHTS AT KANSAS CITY OVER—MISSOURI PACIFIC RAILROAD COMPANY

Applicant UPRR seeks bridge trackage rights over MPRR track from mile post 278.0 in Kansas City, MO, to mile post 283.8 in Kansas City, MO, and mile post 284.7 in Kansas City, KS. UPRR also seeks bridge rights over certain tracks in MPRR's Neff Yard, plus bridge rights over certain passing sidings and auxiliary tracks.

FINANCE DOCKET NO. 30,000 (SUB-NO. 6)

UNION PACIFIC RAILROAD COMPANY—TRACKAGE RIGHTS AT ST. JOSEPH OVER—MISSOURI PACIFIC RAILROAD COMPANY

Applicant UPRR seeks bridge trackage rights over MPRR into MPRR's yard at St. Joseph, MO, between Engineer Chainage Station (ECS) 4+23 and ECS 95+62, a distance of approximately 1.7 miles, including bridge rights over portions of MPRR's yard trackage at St. Joseph, MO.

FINANCE DOCKET NO. 30,000 (SUB-NO. 7)

MISSOURI PACIFIC RAILROAD COMPANY—TRACKAGE RIGHTS AT OMAHA-COUNCIL BLUFFS OVER—UNION PACIFIC RAILROAD COMPANY

Applicant MPRR seeks to extend its existing bridge trackage rights over UPRR in Omaha, NE, to UPRR's yard in Council Bluffs, IA. This extension of trackage rights will be accompanied by a supplemental agreement to an existing agreement approved by the Commission May 30, 1979 in Finance Docket No. 28933. Following approval of the present application, MPRR's trackage rights will extend from UPRR's mile post 6.52 in Omaha,

to mile post 0.0 in Council Bluffs, including certain UPRR yard tracks, passing sidings and auxiliary tracks.

FINANCE DOCKET NO. 30,000 (SUB-NO. 8)

UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY—POOLING BETWEEN OMAHA-COUNCIL BLUFFS AND KANSAS CITY

Upon approval of the control transaction, UPRR and MPRR intend to implement the following pooling arrangements:

The transportation in MPRR trains of certain UPRR traffic over MPRR's route between Council Bluffs, IA, and Kansas City, MO, in accordance with an agreement dated as of August 15, 1980 between MPRR and UPRR.

FINANCE DOCKET NO. 30,000 (SUB-NO. 9)

UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY—POOLING BETWEEN BELOIT AND SALINA, KANSAS

Upon approval of the control transaction, UPRR and MPRR intended to implement the following pooling arrangements:

[660] The transportation in UPRR trains of certain MPRR traffic over UPRR's route between Beloit and Salina, KS, in accordance with an agreement dated as of August 15, 1980 between UPRR and MPRR.

FINANCE DOCKET NO. 30,000 (SUB-NO. 10)

UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY—POOLING BETWEEN LINCOLN AND KANSAS CITY

Upon approval of the control transaction, UPRR and MPRR intend to implement the following pooling arrangements:

The transportation in UPRR trains of certain MPRR traffic over UPRR's route between Lincoln, NE, and Kansas City, MO, in accordance with an agreement dated as of August 15, 1980 between UPRR and MPRR.

FINANCE DOCKET NO. MC-F-14448

UNION PACIFIC CORPORATION, PACIFIC RAIL SYSTEM, INC., AND UNION PACIFIC RAILROAD COMPANY—CONTROL—WPX FREIGHT SYSTEM, INC.

Application for authority under 49 U.S.C. 11343 and 11344 to acquire control of WPX Freight System, Inc., a California corporation, with headquarters at 526 Mission Street, San Francisco, CA, through the ownership by Union Pacific Railroad of the capital stock of the Western Pacific Railroad Company.

FINANCE DOCKET NO. MC-F-14449

Application for authority under 49 U.S.C. 11343 and 11344 to acquire control of Missouri Pacific Truck Lines, Inc., a Texas corporation, with headquarters at 210 North 13th Street, St. Louis, MO, through the ownership by Pacific Rail System, Inc. of the capital stock of Missouri Pacific Corporation.

APPENDIX C

CNW Agreement

IT IS HEREBY AGREED between UNION PACIFIC CORPORATION, PACIFIC RAIL SYSTEM, INC., UN-

ION PACIFIC RAILROAD COMPANY ("UPRR") MISSOURI PACIFIC CORPORATION ("MPC"), and MISSOURI PACIFIC RAILROAD COMPANY ("MPRR") (collectively "the Union Pacific and Missouri Pacific parties"), on the one hand, and CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY ("C&NW"), on the other hand, as follows:

1. As soon as practicable after execution of this agreement, C&NW and the Union Pacific and Missouri Pacific parties will file with the Interstate Commerce Commission ("ICC") a Notice of Settlement Agreement in Finance Docket No. 30,000, *Union Pacific Corporation, Pacific Rail System, Inc.*, and *Union Pacific Railroad Company—Control—Missouri Pacific Corporation and Missouri Pacific Railroad Company*, and related dockets, stating that:

[661] a. C&NW withdraws its present opposition to the proposed consolidation of the Union Pacific and Missouri Pacific parties, which is now pending before the ICC in Finance Docket No. 30,000 and in related Finance Docket Nos. 30,000 (Sub-No. 2), 30,000 (Sub-No. 3) and 30,000 (Sub-No. 10) and Motor Carrier Finance Docket No. MC-F-14449.

b. C&NW withdraws its application for trackage rights and its requests for conditions (except for those listed hereinafter) pending before the ICC in Finance Docket No. 30,000, in Finance Docket No. 30,000 (Sub-No. 35), and in any other related dockets.

c. C&NW has no objection to ICC approval of the transactions pending before the ICC in Finance Docket No. 30,000 and in related Finance Docket Nos. 30,000 (Sub-No. 1) 30,000 (Sub-No. 10) and Motor Carrier Finance Docket Nos. MC-F-14448 and MC-F-14449.

d. C&NW will not seek administrative or judicial review of, or otherwise challenge in any administrative or

judicial proceeding, the transactions referred to in paragraph 1. c.

2. Upon filing of the Notice of Settlement Agreement referred to in paragraph 1, C&NW:

a. Will not take any further steps, in any manner, in the proceedings in Finance Docket No. 30,000 or in any related dockets, to oppose approval of the transactions referred to in paragraph 1. c.

b. Will not seek administrative or judicial review of, or otherwise challenge in any administrative or judicial proceeding, the transactions referred to in paragraph 1. c.

3. Following consummation of the transaction pending before the ICC in Finance Docket No. 30,000, UPRR (A) will work cooperatively with C&NW to preserve existing traffic and operating relationships for traffic moving to, from and through Chicago and (B) will continue to provide existing run-through train service via Fremont and Omaha/Council Bluffs now provided jointly by UPRR and C&NW, at least to the level of service provided as of May 1, 1981, as long as the volume of traffic moving in such run-through trains warrants their operation. In this regard, UPRR and MPRR, on the one hand, and C&NW, on the other hand, will use their best efforts and cooperate with each other in order to maintain and improve the quality of their run-through train service at Fremont and Omaha/Council Bluffs.

4. For five years following consummation of the transaction pending before the ICC in Finance Docket No. 30,000:

(a) *Routes.* UPRR and MPRR shall maintain and keep open all routes and channels of trade with C&NW via existing junctions and gateways for present and future traffic unless and until otherwise authorized by the ICC.

(b) *Rates.* UPRR, at the request of C&NW, shall publish and maintain tariff rates via C&NW and the Fremont and/or Omaha/Council Bluffs junctions between stations or interchanges on UPRR west of the Missouri River (excluding those stations in Kansas), on the one hand, and stations in Official Territory (excluding points in Illinois south of the line of the TPW between Iowa Junction and Watseka via Pekin and Peoria), on the other hand, no higher or otherwise less favorable than apply contemporaneously between the same points over UPRR and MPRR via St. Louis, unless the publication and maintenance of rates with the C&NW will not preserve to UPRR and MPRR a net contribution (total revenues less total variable costs) per rated unit under resultant rates via Fremont and/or Omaha/Council Bluffs of at least 90% of total net contribution to UPRR and MPRR via St. Louis per rated unit, assuming a division of revenue between C&NW, on the one hand, [662] and UPRR and its affiliates, on the other hand, based on the then existing divisions; provided nothing herein shall relieve UPRR of its obligation hereunder if C&NW takes action to achieve the required 90% contribution above designated.

(c) *Non-discrimination in Service.* UPRR shall (1) accept, handle and deliver all C&NW cars inbound and outbound and in overhead service, loaded and empty, without discrimination in promptness or frequency of service as between cars destined to or received from other connecting carriers (including affiliates of UPRR) and irrespective of destination or route of movement;

(2) do nothing to restrain or curtail the rights of industries now or hereafter located on UPRR to route traffic cover [sic] routes and gateways maintained by C&NW; and

(3) use its best efforts to join with C&NW in offering service via Fremont and/or Omaha/Council Bluffs be-

tween stations west of the Missouri River (excluding those stations in Kansas), on the one hand, and stations in Official Territory (excluding points in Illinois south of the line of the TPW between Iowa Junction and Watseka via Pekin and Peoria), on the other, at least equal in every respect to service offered as of May 1, 1981 over those gateways, unless by reason of actions of parties other than UPRR or its affiliates the volume of traffic no longer warrants such service, and to the extent within the control of UPRR and MPRR, equal to comparable service afforded by UPRR and MPRR over their single system via St. Louis.

(d) *Blocking, Interchange and Run-Through Service.* UPRR and C&NW shall continue to provide for blocking of cars, observation of schedules, interchange arrangements and switching practices, as well as existing run-through train service via Fremont and Omaha/Council Bluffs, in the same manner as was jointly provided on May 1, 1982, unless by reason of actions of parties other than UPRR or its affiliates the volume of traffic moving in such run-through trains no longer warrants their operation. In this regard, UPRR and its affiliates and C&NW shall use their best efforts and cooperate with each other in order to maintain and improve the quality of their run-through train service via Fremont and Omaha/Council Bluffs.

5. Following consummation of the transaction pending before the ICC in Finance Docket No. 30,000, MPRR shall handle C&NW traffic originating or terminating in western Iowa, Minnesota, South Dakota, North Dakota, Wyoming (excluding coal originating in Wyoming), and Nebraska in pool service over its lines between Omaha/Council Bluffs and Kansas City (including the UPRR line between Council Bluffs and Gilmore Junction over which MPRR will operate following consummation of the transactions in Finance Docket Nos. 30,000, et al.) on terms set forth in Appendix A of this Agreement; pro-

vided, however, that such pooling arrangement shall not take effect unless and until it has been appropriately approved by the ICC. It is understood that MPRR will have authority to move C&NW traffic over the UPRR line between Council Bluffs and Gilmore Junction following approval of the transaction in Finance Docket No. 30,000 (Sub-No. 7).

6. Following consummation of the transaction pending before the ICC in Finance Docket No. 30,000, UPRR and MPRR shall work cooperatively with C&NW to solve specific operating problems, including those involving transactions of mutual economic benefits, such as

(a) the return of unit grain trains originating on the C&NW and moving to Gulf ports; and

(b) train movements between Council Bluffs, Iowa and Fremont, Nebraska.

7. Following consummation of the transaction pending before the ICC in Finance Docket No. 30,000, MPRR shall amend the trackage rights agreement, dated June 15, [663] 1910, covering C&NW's operation between Leavenworth and Kansas City to provide for cancellation at C&NW's option on one year's notice.

8. The convenants and agreements contained herein are obligations of the respective parties and their successors, and may be enforced either (1) by actions before the ICC as to those imposed as conditions to the transaction pending before the ICC in Finance Docket No. 30,000, or (2) by suit before an appropriate court.

9. The Union Pacific and Missouri Pacific parties and C&NW shall use their best efforts to effectuate this Agreement and to do all acts and to obtain all approvals necessary thereto.

10. This Agreement may be executed in counterparts by the parties hereto, each of which shall be deemed an original and which together shall constitute one and the

same instrument. This Agreement will become effective upon execution by all of the parties hereto; the effective date shall be the latest date of execution by any of the parties hereto.

IN WITNESS WHEREOF, the parties hereto executed this Agreement by their duly authorized representatives.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY

(CORPORATE SEAL)

by _____

ATTEST: _____

Dated: July 3, 1981

UNION PACIFIC CORPORATION

(CORPORATE SEAL)

by _____

ATTEST: _____

Dated: July 6

PACIFIC RAIL SYSTEM, INC.

(CORPORATE SEAL)

by _____

ATTEST: _____

Dated: July 6, 1981

UNION PACIFIC RAILROAD COMPANY

(CORPORATE SEAL)

by _____

ATTEST: _____

Dated: July 6, 1981

[664]

MISSOURI PACIFIC CORPORATION

(CORPORATE SEAL)

by _____

Attest: _____

Dated: July 1, 1981

MISSOURI PACIFIC RAILROAD COMPANY

(CORPORATE SEAL)

by _____

Attest: _____

Dated: July 1, 1981

APPENDIX A

Pooling Agreement Terms

I. *Agency Operations*

A. *Basic Concept.* MPRR will handle separate C&NW trains in pool service between Omaha/Council Bluffs and Kansas City. Only C&NW trains consisting of freight originating or terminating at C&NW stations in western Iowa, Minnesota, South Dakota, North Dakota, Nebraska and Wyoming (excluding coal originating in Wyoming) shall be handled by MPRR. C&NW trains will be handled from the C&NW yard in Council Bluffs and from the C&NW yard in Kansas City. Cars will remain in C&NW's account.

B. *Equipment, Labor & Fuel.* C&NW will provide locomotive power, fuel, and cabooses necessary to handle its traffic. MPRR will supply necessary train and engine crews.

C. *Compensation.*

1. Line Maintenance Costs—Direct and indirect costs of maintaining the line will be allocated between MPRR and C&NW in proportion to total adjusted gross ton miles. (For the purpose of developing total adjusted gross ton miles, ton miles for cars weighing (both tare and lading) 120 tons or more will be multiplied by 1.25; others will be multiplied by 1.00.)

2. Line Operation Costs—Direct and indirect costs of operating the line, including but not limited to ad valorem property taxes, costs of train dispatching, communications, general transportation and other costs related to operating the line (excluding direct and indirect costs incurred in train operations) will be allocated between C&NW and MPRR on the basis of total train miles.

3. Miscellaneous M&O Costs—Actual costs incurred by MPRR for items such as locomotive servicing, locomotive and train inspection, derailments, etc., with GMA additives, will be billed as the expenses are incurred.

4. Train Operation Costs—C&NW will pay MPRR for all direct and indirect expenses of handling C&NW trains, including, without limitation, train and engine crew wages, and train supplies and expenses.

[665] 5. Pooling Fee—C&NW annually will pay MPRR a Pooling Fee of $750,000. The annual pooling fee shall be paid in equal monthly installments.

D. *Liability.*

1. For purposes of this agreement, *Joint Property* means the line and maintenance tools, trains, appliances and equipment engaged in maintaining the line. *Joint Employee* means any officer or employee of MPRR engaged in construction, maintenance, repair or renewal of the Joint Property, or engaged in wrecker service, dis-

patching, or operating trains containing MPRR and C&NW traffic (if any). *Sole Property* means each party's property and property in the account of one of the parties, but MPRR equipment while engaged in wrecking service the cost of which will be borned by C&NW, shall be C&NW Sole Property. *Sole Employee* means any person assigned to any wrecking equipment while Sole Property, and MPRR employees performing other work for the sole benefit of one party, but persons engaged in operating, servicing or maintaining trains consisting solely of C&NW traffic shall be C&NW Sole Employees.

2. Damages due to (a) acts or omission of a Sole Employee of one of the parties, or (b) concurring acts or omissions of a Sole Employee and of a third person, or (c) concurring acts or omissions of a Joint Employee and of a Sole Employee, or (d) any defect in or failure of any kind in the Sole Property of one of the parties, will be borne by the party whose Sole Employee or Sole Property was involved.

3. Damages due to concurring acts or omissions of (a) Sole Employees of each party (notwithstanding concurrence of third parties), (b) Sole Employees of each party and of a Joint Employee, or (c) defects in or failure of the Sole Property of each of the parties, shall be borne equally by the parties, except each party shall bear all damages to its Sole Property and as to its Sole Employees.

4. Damages due to (a) acts of omissions of a Joint Employee (notwithstanding concurrence by third parties), (b) failure of or defect in any Joint Property, or (c) any other cause whatsoever not hereinbefore provided for, shall be borne (1) by each of the parties as to such party's Sole Property, (2) equally by the parties as to third persons and their property, Joint Employees and their property and Joint Property, except when the trains, engines or cars (other than when Joint Property)

or Sole Employees of only one party are concerned, in which case that one party solely bears the damages.

5. Any railroad company, other than the parties hereto, now using or hereafter admitted to the use of Joint Track, or any part thereof, shall, as between the parties, be regarded in the same light as any third person for the purpose of fixing liability for damages under this section; however, neither party hereby assumes any responsibility for any damages occasioned by the acts or omissions of the employees of any such other railroad company or for any damages which such other railroad company shall be obligated to assume in whole or in part pursuant to law or to any agreement relating to such other railroad company's use of Joint Track or any part thereof.

6. If it shall be impossible to determine whether any person is the passenger, patron or employee of solely one of the parties, then the liability for any injury to or death of such person or for loss of or damage to the property of such person shall be apportioned as in the case of third persons.

7. Each party shall bear all damages for which such party shall be liable under the provisions of this section and shall indemnify and save harmless the other party against such damages.

8. Each party shall have the right to settle, or cause to be settled for it, all claims for damages for which such party shall be liable under the provisions of this section and to defend or cause to be defended all suits for the recovery of any such damages.

[666] 9. In the event both parties shall be liable hereunder for any damages and the same shall be settled by a voluntary payment of money or other valuable consideration by one of the parties jointly liable therefor, release from liability shall be taken for and in the name of both parties so liable. However, no such settlement in excess of the sum of $10,000 shall be made by or for

either party so jointly liable without the authority of the other party, but any settlement made by either party in consideration of said sum or a lesser sum shall be binding upon the other party.

10. In case a suit shall be commenced against either party for or on account of damages for which the other party is solely or jointly liable under the provisions of this section, the party so sued shall give to such other party notice in writing of the pendency of such suit and thereupon such other party shall assume or join in the defense of such suit.

11. Neither party shall be concluded by any judgment against the other party unless such party shall have had reasonable notice requiring it to defend and reasonable opportunity to make such defense. When such notice and opportunity shall have been given, the party so notified shall be concluded by the judgment as to all matters which could have been litigated in such suit.

12. All claims and demands for damages arising under the provision of this section shall be investigated by or for the account of the party whose employee is injured or whose property is damaged, but in the event employees of both parties are injured, or the properties of both parties are damaged, the representatives of the parties who handle such claims shall agree among themselves as to which of said parties shall make the investigation.

II. *Labor Protection.*

If MPRR adds to its labor force as a result of this Agreement so that the number of its employees exceeds the average number of employees projected in Exhibits 4 and 27 of the UP/MP/WP Operating Plan (March, 1980), C&NW will provide full labor protection for the incremental employees in the event operations under this Agreement cease or are reduced.

III. *Improvements.*

MPRR reserves the right to make any additions and betterments (improvements) to the line up to an amount of $250,000 (for a single improvement, amount to be escalated annually by AAR Western Index, excluding the fuel component) without the approval of the C&NW (for a single addition or improvement). Improvements shall be added to the Improvement Valuation Base if they are required to meet governmental regulations or will benefit both parties' operations.

Improvements which cost more than $250,000 (amount to be escalated annually by the AAR Western Index, excluding the fuel component) may be made but not added to the Improvement Valuation Base without the approval of the C&NW. (C&NW shall not unreasonably withhold its consent.) However, if C&NW fails to give consent or fails to agree that any improvements should be added to the Improvement Valuation Base, then the matter shall be submitted to arbitration. If arbitration determines that C&NW significantly benefits by improvements or that they are required to meet required maintenance standards or satisfy laws or governmental regulations, the improvements shall be added to the Improvement Valuation Base. If any improvement, including grade separation, grade crossings, signals or other warning devices are necessary or required by law, regulation, or other public authority, would not have been necessary or required had C&NW traffic not been moving over the lines, then all cost and maintenance for same shall be borne by C&NW.

[667] In addition to all other compensation, C&NW shall pay annually, an Improvement Ownership Cost equal to the original cost of the Improvement Valuation Base times one-half UPRR's current full pretax cost of capital computed in accordance with the ICC's methodology in effect on May 19, 1981. If another railroad (other than UPRR) is admitted to use the line, C&NW's

share of UPRR's current cost of capital will be appropriately adjusted.

The C&NW's share of the amortization of any improvements added to the Improvement Valuation Base and the Operating Expense portion of track programs (program rail, tie, surfacing, and sledding), shall be guaranteed by the C&NW in the event this Agreement is terminated; provided, however, that C&NW shall be entitled to a credit against any such guarantee for the salvage value of C&NW's share of any such improvements. Salvage value is defined as the value (if any) of the improvements so guaranteed as determined by the parties' respective engineering departments. Any disputes over the appropriate salvage credit will be submitted to arbitration.

V. *Nonassignability.*

No sale, assignment, mortgage or lease by C&NW of any interest or right given it under this Agreement shall be valid or binding without the prior written consent of MPRR.

VI. *Arbitration.*

In the event any disagreement shall arise between the parties as to the interpretation or the application of the provisions of this Agreement, then, upon the written request of either party, in which request the issue in dispute is set forth, the matter in controversy shall be submitted to arbitration.

Such dispute shall be submitted to a single arbitrator, experienced in matters of the character in dispute, if the parties involved in such dispute are able to agree upon such single arbitrator within sixty (60) days after the party desiring such arbitration shall notify in writing the other party to such dispute.

If such single arbitrator cannot be agreed upon before the expiration of such period of sixty (60) days, such arbitration shall be submitted to three arbitrators experience in matters of the character in dispute to be appointed as follows:

A. The party desiring arbitration shall select one arbitrator and shall notify the other party of such selection, whereupon the other party shall, within thirty (30) days after receipt of notice from the moving side, select its arbitrator and give notice to movant of such selection. If after said thirty (30) days, the notified party shall have failed or refused to select its arbitrator, then such arbitrator may upon application by movant after not less than five (5) days' notice to the other party, be appointed by the senior Judge of the United States District Court in the District in which the City of Kansas City, Missouri, is located who is willing to act. The third arbitrator shall be appointed by the first two appointed, but upon their failure to appoint the third arbitrator within thirty (30) days, he may be appointed by the said Judge as aforesaid. In the event of any such failure, the arbitrator or arbitrators appointed shall certify the failure aforesaid to said Judge, and the recitals of the certificate with respect of such failure shall be binding upon all parties involved.

B. The single arbitrator or the three arbitrators, as the case may be, shall as soon as practicable after their selection meet to hear and decide the matter or matters submitted to them, and shall give to each party of such arbitration twenty (20) days' notice of the time and place of such meeting. After hearing the parties to such arbitration and taking such testimony or making such investigation as they may deem necessary, they shall make their decision in writing upon the matter or matters so submitted to them and shall deliver a copy of such decision to the parties to such arbitration and such decision of such single ar- [668] bitrator or of a ma-

jority of the arbitrators, as the case may be, shall be final and binding upon the parties to such arbitration as to the matter or matters submitted for arbitration and each of the parties agree that forthwith, upon the rendering of such decision or award, it will conform to and comply with requirements thereof.

C. The books and papers of each party to such arbitration, so far as they may relate to matter submitted to arbitration, shall be open to the examination of the arbitrator or arbitrators. Each party shall pay for the services of the arbitrator chosen by or for it and of the witnesses appearing for it, and the parties shall jointly and equally pay for the services of the remaining arbitrator (or for the sole arbitrator, if such be the case) and for any other different expenses of the arbitration. Until the arbitrator or arbitrators shall make their award, the business, settlements and payments to be transacted and made under this Agreement shall continue to be transacted and made in the same manner and form existing prior to the rise of such dispute.

VII. *Approvals: Terms and Termination.*

Agreement is contingent upon (1) approval by the ICC of the UPRR/MPRR consolidations and the Pooling Agreement and (2) consummation of the consolidation. Term of agreement begins upon effective date of UPRR/MPRR consolidation for a term of fifteen (15) years and thereafter subject to termination by C&NW upon two years' written notice.

APPENDIX D-1

Conrail Agreement

IT IS HEREBY AGREED between UNION PACIFIC CORPORATION, PACIFIC RAIL SYSTEM, INC., AND UNION PACIFIC RAILROAD COMPANY ("UPRR") (collectively "Union Pacific"), on the one

hand, and CONSOLIDATED RAIL CORPORATION ("Conrail"), on the other hand, as follows:

1. On or before March 31, 1981, Conrail and Union Pacific will file with the Interstate Commerce Commission ("ICC") as a notice of settlement in Finance Docket No. 30,000, *Union Pacific Corporation, Pacific Rail System, Inc., and Union Pacific Railroad Company—Control—Missouri Pacific Corporation and Missouri Pacific Railroad*, and related dockets, stating that:

a. Conrail withdraws its present opposition to the transactions pending before the ICC in Finance Docket No. 30,000 and in related Finance Docket Nos. 30,000 (Sub-No. 1)—30,000 (Sub-No. 10) and Motor Carrier Finance Docket Nos. MC-F-14448 and MC-F-14449.

b. Conrail has no objection to ICC approval of the transactions pending before the ICC in Finance Docket No. 30,000 and in related Finance Docket Nos. 30,000 (Sub-No. 1)—30,000 (Sub-No. 10) and Motor Carrier Finance Docket Nos. MC-F-14448 and MC-F-14449.

c. Conrail will not seek administrative or judicial review of, or otherwise challenge in any administrative or judicial proceeding, the transaction pending before the ICC in Finance Docket No. 30,000 and in related dockets.

d. Conrail withdraws as a party of record in the proceedings in Finance Docket No. 30,000 and in all related dockets.

2. Upon filing of the notice of settlement referred to in paragraph 1, Conrail:

[669] a. Will not participate in the future, in any manner, in the proceedings in Finance Docket No. 30,000 or in any related dockets.

b. Will not seek administrative or judicial review of, or otherwise challenge in any administrative or judicial

proceeding, the transactions pending before the ICC in Finance Docket No. 30,000 and in related dockets.

3. Following consummation of the transaction pending before the ICC in Finance Docket No. 30,000, Conrail shall be entitled to receive applicable UPRR—C&NW—Chicago—Conrail rate divisions on any traffic that moves:

a. UPRR—MPRR—Chicago—Conrail;

b. To, from or via points on Conrail lines east of the Illinois/Indiana state line; and

c. To, from or via UPRR points west of North Platte, Nebraska (except for such points located in the State of Kansas).

The terms of this paragraph 3 shall apply only to traffic that meets all three criteria set forth in parts a., b., and c. of the immediately preceding sentence. The term "C&NW," as used in this paragraph 3, refers to Chicago and North Western Transportation Company.

IN WITNESS WHEREOF, the parties hereto executed this Agreement by their duly authorized representatives.

CONSOLIDATED RAIL CORPORATION

(CORPORATE SEAL)

by _____

ATTEST: _____

Dated: March 9, 1981

UNION PACIFIC CORPORATION

(CORPORATE SEAL)

by _____

ATTEST: _____

Dated: March 26, 1981

PACIFIC RAIL SYSTEM, INC.

(CORPORATE SEAL)

by _____

ATTEST: _____

Dated: March 26, 1981

[670]

UNION PACIFIC RAILROAD COMPANY

(CORPORATE SEAL)

by _____

ATTEST: _____

Dated: March 26, 1981

APPENDIX D-2

DRGW

PROPOSED CONDITION FOR INDEPENDENT RATEMAKING AUTHORITY

DRGW shall have the unrestricted rate concurrence of UP for all traffic (except coal) to/from or via DRGW on joint-line routing to/from or via the WP and its subsidiaries, provided, however, that DRGW shall guarantee WP its revenues on equivalent rates and routes, as escalated by cost recovery percentage increases taken by WP or any particular escalation provisions which may apply to the reference movement. WP divisions of revenues shall be calculated based upon divisional arrangements existing as of September 15, 1981 between WP/UP or WP/DRGW whichever is higher. In the event WP with respect to a particular rate reduces or increases its rates via the UP/MP/WP system or in connection with any other carriers, DRGW will guarantee WP the revenue it would receive on its reduced or increased rate, as the case may be, based upon divisions percentages existing as of September 15, 1980.

APPENDIX E-1

Relevant product markets

In this appendix we examine the current extent of rail-truck competition within important geographic markets served by the applicants and conclude that, for the purposes of this proceeding, rail freight transportation should be treated as a separate product market.

We first address the arguments, presented mainly by applicants, that motor carriers should be included in all relevant markets. Motor carriers present many attractive options to intercity freight shippers. Although their rates are on average somewhat higher than those charged by railroads, trucks offer certain superior service attributes, such as greater speed and reliability, which are tied in part to the advantages of single-system operations. Over time, special commodity motor units, either as separate carriers or as divisions of general freight motor carriers, have skillfully penetrated many long-haul freight markets by expanding the number of commodities they carry and the range of points, states, and regions which they serve.

Motor carriers offer shippers a combination of flexible, high-quality service and single-system control over equipment, schedules, and routings. For example, Yellow Freight, with an average length of haul of 1,105 miles, was one of sixteen motor carriers with a 1978 average length of haul greater than a thousand miles operating in the applicants' service area.

[671] Aided by their service advantages and by the growth of the Interstate Highway System, truck's share of intercity freight ton-miles rose from 10.0 percent in 1947 to 24.3 percent by 1979. Railroad's share of intercity freight ton-miles declined from 65.3 percent to 35.5 percent over that period.

Today motor carriers exhibit a nontrivial share of transcontinental traffic flows. For example, applicants developed the figures in Table I which shows the share of total traffic transported by common, private, and exempt motor carriage between three west coast BEA's served by the applicants (Los Angeles, the Bay Area, and Seattle/Portland) and eight important eastern BEA's.[1]

TABLE 1

*Motor carrier * share of total traffic for selected transcontinental flows*
(Percent of total tonnage)

	Seattle/Portland		Bay Area		Los Angeles	
Eastern BEA	Eastbound	Westbound	Eastbound	Westbound	Eastbound	Westbound
Boston	8	27	11	35	27	40
New York	6	49	12	42	35	44
Atlanta	29	42	16	48	44	33
Memphis	2	4	7	18	19	9
Pittsburgh	3	20	40	20	65	25
Cleveland	8	55	42	36	54	41
Chicago	4	9	15	13	20	11
St. Louis	10	13	53	19	40	21

* Includes common, private, and exempt carriage.

Even over these long-distance transcontinental routes, motor carriage is available to, and utilized by, certain shippers for a wide variety of commodity flows. This is particularly true for time-sensitive traffic. However, examination of modal split statistics shows that, for some commodities, railroads have a significantly higher market share than the other modes. For example, in the U.S. Department of Commerce, 1977 Census of Transportation, Commodity Transportation Survey (1981): (1) for lumber and wood products, except furniture (STCC Code 24), 80 percent of the tonnage moving 1,000 to 1,499 miles and 87 percent of the tonnage moving over 1,500 miles moves by rail; (2) for paper and allied products

[1] BEA's are economic areas as defined by the Bureau of Economic Analysis of the United States Department of Commerce.

(STCC Code 26) 75 percent of the tonnage moving over 500 miles moves by rail; (3) for chemicals and allied products (STCC Code 28), 78 percent of the tonnage moving over 500 miles, where water and pipeline service is not available, moves by rail; and (4) for transportation equipment (STCC Code 37), 82 percent of the tonnage moving over 500 miles moves by rail.

More important, however, than the showing that nonrail shares are small for certain specific commodities over relatively long lengths of haul, is that modal split statistics cannot be used by themselves to show that rail and truck are *close* substitutes. Even for commodities and routes for which trucks (or other modes) have a significant modal share, many specific shippers are unable to utilize nonrail modes for some or all of their ship- [672] ments, or could do so only at much higher costs. A nontrivial share for trucks in certain markets does not by itself imply that trucks are an economical alternative for the remainder of the traffic in those markets. For example, occasional long distance shippers may utilize trucks only because they do not generate the large-volume, steady traffic for which railroads are better suited. Many shippers testified in this proceeding that they do not use extensive motor carrier service for long hauls, either because of the greatly increased costs or because of the impracticability for their particular commodities. Even applicants admitted that "in certain specific geographic pairings and for some specific commodity types (long hauls of certain ores, coal, some mineral movements, and the like), it is, of course, true that the rail mode may offer important logistical advantages which shippers may find significantly more attractive than those offered by other modes."

Thus it is inappropriate simply to observe that railroads and trucks carry significant volumes of the same commodities, and to conclude that therefore the two modes are necessarily close substitues in all markets.

Rather, it is essential that the nature of the substitution be understood.

Two commodities are considered to be in the same market when they are reasonable substitutes for the buyer's purpose. For any specific commodity, such as rail service, there is always a hierarchy of close, less close, and more distant substitutes. The principle issue is the degree in which trucks are interchangeable with railroads from the perspective of shippers so that they can act to constrain railroads' rates and services to competitive levels. The closeness or degree of substitution between rail and truck can be measured, albeit imperfectly in practice, by the extent to which shippers alter their traffic patterns in response to a change in relative price or quality between the modes.

The real question is what would happen to the volume of rail traffic if rail rates were to rise relative to truck rates. If rail traffic volume were to fall dramatically, then the modes are close substitutes and can be considered as components of one market. However, if rail traffic volume is relatively insensitive to changing rail/truck rate differentials, separate product markets are indicated. We have already cited evidence which shows that trucks are not an effective competitive alternative to railroads for many commodities and/or lengths of haul. Certain econometric evidence discussed in the record also suggests that this is the case.

Richard Levin finds a price elasticity of demand for rail freight services of —0.25 to —0.35, indicating that a ten percent rise in rail rates relative to truck rates would cause only about a three percent reduction in rail traffic.[2] Similarly, T. Oum's analysis of elasticities of substitution in Canada shows that for relatively low-value commodities, effective rail-truck competition exists only

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[2] R. Levin, *Allocation in Surface Freight Transportation: Does Rate Regulation Matter?* 9 Bell J. Econ. 18 (1973).

for short-hauls.[3] Friedlaender and Spady estimate the rail price elasticity for bulk commodities (other than coal, field crops, and other agricultural commodities) in 1972 to be −.59 in the Official Territory, −.49 in the Southern Territory, and the lowest value, −.37, in the Western Territory served by the applicants.[4] Norman H. Jones, in a study performed for the Federal Railroad Administration, concluded that the price elasticity of demand for rail service by shippers of bulk commodities is quite low and uniformly less than one, suggesting that railroads enjoy significant pricing freedom (other than regulatory constraints) for bulk commodities.[5]

[673] Finally, railroads have a cost (and therefore rate) advantage over trucks for a significant volume of long-haul freight movements because of the railroads' relative fuel efficiency. For every 100 ton-miles of freight, railroads consume 0.45 gallons of diesel fuel, whereas trucks consume 1.43 gallons. As oil prices rise, trucks may be at a comparative disadvantage in markets where today they provide effective competition to railroads.

Conclusion

Applicants have shown that intermodal competition is an important force in determining rail rates and service levels for the transportation of many commodities between important geographic areas. They have also shown that the proposed merger, by allowing applicants' shippers to take advantage of single-system service, would promote intermodal competition and thus provide a significant public benefit.

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[3] T. Oum, *A Cross Sectional Study of Freight Transport Demand and Rail-Truck Competition in Canada,* 10 Bell J. Econ. 463 (1979).

[4] A. F. Friedlaender and R. Spady, *Freight Transport Regulation: Equity, Efficiency and Competition in the Rail and Trucking Industries,* (MIT Press, 1981).

[5] Norman H. Jones, Jr., *Rail Monopoly Markets* (Public Interest Economics Center, 1980).

However, given the enormous distances in the applicants' market area, there still exists a large number of movements of certain commodities for which intermodal competition cannot, by itself, adequately constrain rail rates and service to competitive levels. Therefore, in examining the competitive effects of the proposed consolidation, we will then define the relevant product market to be those transportation services provided by rail carriers.

APPENDIX E-2

Summary of
positions regarding general competitive effects

DOJ

DOJ's competitive analysis concentrates on the parallel impacts of the consolidation. DOJ finds a "core of competitive harm," and concludes that competition is likely to be lessened in a cluster of markets located primarily in the central corridor region.

DOJ adopts section 7 of the Clayton Act as the analytic framework for its considerations of the competitive impacts of the proposed consolidation. After defining relevant markets, DOJ goes on to establish and apply standards for assessing the consolidation's impacts within those markets. This is done in stages. First, DOJ presents a general discussion of how competitive harms can result from the structural effects of rail mergers. Competitive harms that can result from parallel and end-to-end aspects of rail mergers are examined separately. DOJ then goes on to establish standards for identifying markets where competitive harms may occur, apply those standards, and identify those markets where competition is shown to be adversely affected by the consolidation.

DEFINING RELEVANT MARKETS

DOJ utilizes the following definition of "markets":

> Markets are arenas in which buyers and sellers interact to determine the prices and quality of products or services. For practical purposes, a group of similar products or services define a market if a sole supplier of those goods or services can maintain a price above the level that would prevail if there were many competing suppliers. That pricing flexibility or market power is limited by the ability of consumers to purchase substitutes as well as by the ability of other producers to enter and supply the goods in the market.

[674] DOJ states that when utilizing a section 7 framework, the focus must be narrowed to *relevant* markets. These have both product and geographic dimensions, and must be defined in light of commercial realities.

RELEVANT PRODUCT MARKETS

DOJ asserts that products are in the same market when they are reasonable substitutes for one another, and concludes that rail markets alone are the proper primary focus for an assessment of the proposed consolidation's competitive impacts.

DOJ feels that applicants' reliance on modal split statistics to show a high degree of intermodal competition is unwarranted. The Department notes that it is inappropriate simply to observe that railroads and trucks carry many of the same commodities, and therefore to conclude that the two modes are necessarily close substitutes in all markets. Rather, it is essential that the nature of the substitution be understood.

DOJ notes that a nontrivial motor carrier share of any commodity-distance class does not necessarily indicate that motor carriers are an economical alternative for all

shippers in the class. For example, occasional long distance shippers may use trucks over such distances because they do not generate the large-volume, steady traffic for which railroads are better suited. For such shippers, railroads and trucks cannot be considered close substitutes.

DOJ examines several econometric studies of modal demands that find limited shipper modal shifts in response to changes in relative rail-motor rates, and concludes that rail-truck substitutability is fairly low, even where the service attributes of the modes are considered, and that, therefore, properly delineated rail markets are highly relevant to any assessment of this consolidation's competitive effects.

RELEVANT GEOGRAPHIC MARKETS

DOJ utilizes the test set forth in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327 (1961) as the proper methodology for ascertaining relevant geographic markets in section 7 cases. Such markets are defined as the area in which providers of a particular commodity operate and to which purchasers can turn for such commodities.

DOJ concludes that origins and destinations satisfy this standard for rail service. DOJ notes that the origins and destinations that define markets range from a plant siding to the area of TOFC motor carrier movement, and decides upon origin and destination county pairs as the relevant geographic markets in this proceeding.

PARALLEL ASPECTS OF THE PROPOSED CONSOLIDATION

In a parallel rail merger, the participating carriers operate in the same markets, which DOJ has defined to be origin/destination county pairs. Such a merger, by eliminating competition between the merging railroads in markets where they formerly competed, acts directly to reduce the number of independent competitors and assert-

edly enhances the ability of the remaining railroads to coordinate rate and service levels.

In assessing the competitive impact of the parallel aspects of the proposed consolidation, DOJ utilized the 1979 ICC-DOT Carload Waybill Sample (the one percent sample) to identify county pairs where the applicants appear to compete for traffic. Market shares (of carloads) for these county pairs were computed, with DOJ assigning an entire rail movement to an applicant participating in any portion of that movement. DOJ defended this allocation of traffic by stating:

[675]

> A structural change in the railroad industry can have an adverse competitive effect if it reduces the options available to a shipper or receiver. A carrier can affect the rates and services provided on its routes and thereby affect the distribution of traffic on those routes. As a result, the consolidation of carriers on competing routes gives the merged firm control over at least some portion of those competing routes and reduces the shipper's independent alternatives. The participation shares indicate the degree to which the applicants individually and jointly can exercise some control over the traffic in a market through their rate and service policies.

DOJ identified 250 county pairs in which the applicants handle traffic on alternate routes and therefore appear to compete, and examined those 250 county pairs in search of markets where the consolidation might produce competitive harms. Early in this proceeding DOJ subjected those county pairs to its independent route analysis, and as a result initially excluded 185 county pairs from further consideration for two related reasons. First, county pairs were eliminated when DOJ estimated that the number of independent routes would be unaffected by the consolidation. For example, DOJ noted that be-

tween the Pacific Northwest and Southern California, shippers can use the UP route through Ogden or the BN-WF-ATSF route through Bieber and Stockton. However, BN also handles this traffic with SP through Portland or other Oregon points, so that BN will operate a route that is independent of the applicants' routes. In this case, there are two sets of independent routes—involving UP or BN movement in Washington—both before and after the consolidation.

Second, in the course of this screening process, DOJ initially excluded from the universe of relevant county pairs those in which the applicants' alternative routes were not operated completely independently and which, therefore, did not appear to be fully competitive with one another. For example, on certain transcontinental movements from counties in the east, Conrail appeared in the waybill sample as the sole originating carrier. DOJ assumed that even if UP and MP, for example, were in competition along some portion of the route between the origin and destination counties, Conrail, which has a monopoly at the origin, would, within the limits of rate regulation, have the ability to establish rates on all possible joint routes as high as it chooses. In such a situation DOJ stated that Conrail would thus be in a position even before the merger to negate the impact of any "downstream" competition among potential connecting carriers, with the result that the elimination of such downstream competition due to the UP/MP/WP consolidation could not be said to deprive shippers in such markets of meaningful options.

The remaining 65 county pairs had 1979 rail revenues of $116.8 million. DOJ then excluded from consideration those county pairs where the applicants' joint share of rail traffic was not large or not much larger than the applicants' individual shares. Only county pairs where the consolidation would result in the applicants handling a significant and substantially increased market share were

considered as markets where competitive harm was likely to occur. The decision rule used by DOJ, a "50-10 test," was that competitive harm resulting from horizontal aspects of the consolidation is most likely to occur for county pairs where the consolidated system's market share was greater than 50 percent and greater than each of the applicant's individual market shares by at least 10 perecent. DOJ eliminated 15 county pairs using this test, and the remaining 50 county pairs had 1979 rail revenues of $63 million.

Additional county pairs were eliminated following tests for rail source competition (when the applicants' share of specific important commodities was less than 50 percent) and motor competition (where the length of haul between a county pair was less than 1,000 miles or where the states originating more than half of all shipments to a county of specific important commodities were within 1,000 miles of the county).

[676] Finally, DOJ initially stated in this proceeding that 12 county pairs, with $22 million in 1979 rail revenue, were the markets where harm appeared most likely to result from the elimination of competition among the applicants on parallel routes. DOJ later modified this position, asserting that its earlier analysis almost certainly understated the universe of markets in which competition is likely to be lessened by the proposed consolidation.

DOJ states that its earlier independent route analysis, through which 185 county pairs were screened out of its assessment of potential competitive harms, should have retained many of the county pairs that were eliminated, since later evidence presented in this proceeding substantiated the possibility of meaningful rate and service competition among railroads (such as applicants) on one portion of a movement despite the presence of a monopoly line (such as Conrail) elsewhere in the route. There-

fore, DOJ extrapolates from its earlier analysis and suggests there could be another 34 county pairs, with 1979 rail revenues of $63 million, in which consolidation related competitive problems would persist.

However, DOJ cautions that the revenues in the markets before consolidation are not a measure of competitive harm against which the benefits of the consolidation are to be weighed. DOJ asserts the actual harm will depend on cost and demand conditions as well as the effect on price of the reduction in competition.

The county pairs identified by DOJ as exhibiting competitive harms do not exist in random isolation. Instead, they define a cluster of markets, located primarily in territories now served by UP and MP through the central corridor. DOJ believes that its analysis suggests strongly that within that group there does exist a core of competitive harm.

END-TO-END EFFECTS OF THE PROPOSED CONSOLIDATION

DOJ notes that while end-to-end mergers involve railroads which do not compete between the same origins and destinations, such mergers can still produce competitive harms. First, source competition at common points can be adversely affected. Second, such a merger can act to reduce competition between the merged firm and other railroads. DOJ states that this can occur because a railroad which is the sole carrier on one portion of a movement might have the ability to eliminate competition between its merger partner and other potential interline carriers for the other part of the haul. DOJ states that, in addition to the direct anticompetitive impact, such market power diversions may lead to reduced ability on the part of carriers suffering such diversions to competitively discipline the rates and service levels offered by the consolidated system.

In searching for adverse competitive effects of the proposed consolidation upon source competition, DOJ again used its "50-10 test" to isolate those counties where the merger would result in the applicants handling a significant and substantially increased share of total deliveries of specific commodities. Using the 1979 One Percent Waybill sample, DOJ identified 267 commodities (at the 4-digit STCC level) in 134 counties where the consolidated system's share of deliveries was greater than 50 percent and greater than each of the applicant's individual shares by at least 10 percent. Rail revenues for this traffic were about $600 million in 1979.

Motor carriers which serve these counties from nearby origins can mitigate any competitive harms by effectively competing with railroads for many of the commodities in question. Using the U.S. Census Bureau's 1977 Census of Transportation Commodity Transportation Survey Summary, which covers only manufactured goods, DOJ identified $350 million in rail traffic (from the original $600 million) where the states originating more than half of the traffic in a commodity were within 1,000 miles of the county in question. Therefore, DOJ asserted that, of the original $600 million in rail traffic for which there was potential harm to source competition, motor carrier competition is likely to be effective in markets with at least $350 million in rail revenues.

[677] The remaining $250 million in rail revenues includes $100 million in primarily bulk commodities not covered by the Census of Transportation, so that no truck data were available. The remainder ($150 million) in rail revenues represent mostly traffic in motor vehicles and equipment.

DOJ considers the likelihood of competitive harm involving this $250 million in rail traffic to be mitigated to some extent by the possibility of product competition at the various destinations. To the extent that other products reaching these destinations are reasonably close sub-

stitutes for the products over which the consolidated system may have some control, the availability of those substitutes constrains the ability of the consolidated system to extract any monopoly profits associated with lessened source competition.

DOJ did not perform any of its own traffic diversion studies to assess the second type of competitive harm that can result from end-to-end affects of a rail merger. However, it suggests traffic diversion studies utilized by rail carriers are often misleading. In general, the loss of traffic to another carrier can indicate either the presence of competition or its absence, since such traffic shifts can occur because of either the exercise of market power or the improvement of service, and even where diversions are attributable to the exercise of market power, their impact may be offset to some degree by greater efficiency. Consequently, DOJ urges the Commission to proceed cautiously in analyzing foreclosure arguments of this kind.

Furthermore, in assessing whether individual carriers might be so weakened by diversions that competition in general is adversely affected, DOJ is not persuaded by the record that their impact of traffic diversions is likely to reduce substantially the competitive viability of the affected carriers.

DOT

In assessing the consolidation's competitive impacts, DOT begins by defining those markets within which competition is to be evaluated.

DEFINING RELEVANT PRODUCT MARKETS

DOT confines its competitive analysis to the effects of the proposed merger on *rail* competition, asserting that there is not sufficient intermodal competition to provide a competitive restraint on a railroad's market power for some movements of certain commodities.

DOT joins DOJ, OSC, and several protesting carriers in attacking the applicants' claim that there is sufficient intermodal and source competition to constrain any possible exercise of a rail carrier's market power. While DOT feels the applicants' use of modal split statistics is evidence of significant intermodal competition for some long distance hauls, these statistics also show that for some commodities rails have a higher market share than other modes. For example, DOT notes that in the U.S. Department of Commerce, 1977 Census of Transportation, Commodity Transportation Survey (1981): (1) for lumber and wood products, except furniture (TCC Code 24), 80 percent of the tonnage moving 1,000 to 1,499 miles and 87 percent of the tonnage moving over 1,500 miles moves by rail; (2) for paper and allied products (TCC Code 26) 75 percent of the tonnage moving over 500 miles moves by rail; (3) for chemicals and allied products (TCC Code 28), 78 percent of the tonnage moving over 500 miles, where water and pipeline service is not available, moves by rail; and (4) for transportation equipment (TCC Code 37), 82 percent of the tonnage moving over 500 miles moves by rail.

Furthermore, the Department notes that even for commodities for which trucks have a significant modal share, many specific shippers are unable to utilize nonrail modes for some or all of their shipments, or could do so only at much higher cost. These shippers require the maintenance of intramodal competition in order to realize the benefits of the [678] proposed consolidation. Thus, DOT concludes that, despite the high market shares of water and motor carriers in some markets, for some movements rail carriers are the only economic transportation alternative.

DOT states that passage of the Staggers Act, together with the Commission's utilization of its exemption powers, has shifted emphasis from government regulation to market forces to achieve efficient resource allocation and

competitive pricing. DOT suggests that this makes the maintenance of intramodal competition critical in determining whether to approve the proposed consolidations.

ASSESSING COMPETITIVE IMPACTS

DOT concludes that in certain markets (i.e. broad geographic regions) or corridors (i.e. parallel routes between major origins and destinations) the proposed consolidation will reduce the level of rail competition. This will occur in two distinct ways. First, certain parallel routes will come under common control by the applicants. Second, certain carriers will lose their last neutral or friendly connection to markets formerly reached in joint-line service with one or more of the applicants. DOT asserts that, in either of these cases, the consolidation will reduce the number of competitive routes available to the shipping public, thereby reducing the level of competition.

Central to DOT's competitive analysis is its market power diversion study. DOT notes that traffic diversions are not, in and of themselves, either costs or benefits of a merger. Instead, DOT uses traffic diversions caused by an increase in applicants' market power as a measure of reductions in competition. The DOT market power diversion studies are analyzed in Appendix E-3.

DOT states that it relies on "market power diversions" rather than all traffic diversions in assessing competitive impacts because increases in market shares related simply and directly to any traffic diversion fails to consider whether those increases are the result of more or less competition. DOT states that where such increases in market share are a result of improvements in service the increase in concentration ratios cannot be characterized as reflecting a reduction in competition.

OSC

OSC notes that rail regulatory reform under the Staggers Act is intended, in part, to free rail prices from reg-

ulation. The success of regulatory reform will thus depend on the existence of adequate competition to compel railroads to provide the rate/service package shippers desire and to promote efficiency. OSC asserts that the proposed consolidation will give rise to potential risks to competition in three important areas: transcontinental traffic between the West Coast and the Midwest gateways; coal; and traffic in the Midwest north/south corridor. OSC concludes that mergers such as this threaten the success of regulatory reform.

DEFINING RELEVANT MARKETS

OSC asserts that the proper markets in which to assess the consolidation's competitive impacts are relevant *rail* markets. It describes the transcontinental movement of freight as a bundle of markets, each with separate, sometimes overlapping product and geographic definitions.

OSC criticizes applicants' use of modal split statistics to show intermodal competition. OSC argues that while that type of data do show there are some markets in which trucks provide an adequate substitute to rail, they do not show that is the case for all markets. Modal share statistics simply do not address the real competitive issue: what would happen [679] if rail transcontinental rates rise relative to truck rates. The fact that trucks have a certain percentage of the traffic in a geographic market does not mean that they could increase their participation in the movement of all commodities in that corridor to the extent necessary to prevent railroad exercise of market power.

OSC notes that as length of haul increases, more commodities become rail dominated. And regardless of the length of haul, OSC believes that some commodities move in markets where trucks cannot compete.

In the Midwest north-south corridor distances are often shorter than for transcontinental traffic. OSC as-

serts that trucks cannot effectively compete for most rail traffic in the corridor since the rail traffic is primarily bulk commodities. For example, much of the traffic interchanged with the UP at Kansas City is grain. Other leading commodities are chemical products, soda ash, rock, fertilizer, coal, and other heavy loading commodities. Barges are not effective competitors with rail for this traffic since many shippers do not have affordable access to barge movements. Furthermore, the Missouri River is closed to barge traffic for several months each year.

OSC concludes that for some important commodities and distance of hauls, railroads serve separate markets.

OSC feels that its conclusion as to the limited degree of rail-truck competition is confirmed by the low estimate of truck diversions in the applicants' nonrail diversion study. Applicants point out that OSC had erroneously used applicants' estimated profit from truck diversions ($7.9 million) instead of the estimated diversions of $32.5 million. While the correct figure is only about one sixth of the Commission's estimate of traffic applicants would divert from other rail carriers, the nonrail diversion study was a limited study and did not reflect the entire universe of possible motor carrier diversions. Nonetheless, OSC concluded that the predicted nonrail diversions were much lower than a simple application of modal split statistics would imply, suggesting that modal split statistics do overstate the degree of rail-truck competition.

ASSESSING THE COMPETITIVE IMPACTS OF THE PROPOSED CONSOLIDATION

Having constrained its competitive analysis to that of assessing the proposed consolidation's impact on rail competition, OSC further breaks down rail traffic into two relevant geographic markets: transcontinental traffic; and north/south traffic in the Midwest. Each is analyzed separately.

TRANSCONTINENTAL RAIL TRAFFIC

OSC states that while the northern, central, and southern transcontinental corridors are not entirely separate, it is not only appropriate, but imperative, to examine the effect of the merger on competition through the central corridor as a separate issue.

OSC does not present or agree to a single estimate of the consolidation's impact on competition in the central corridor. Instead, OSC notes that, while there is some variation in the methodologies and the estimates of competitive impacts by the protesting carriers and public parties who studied the level of concentration through the central corridor, all show a rise in the degree of concentration as a result of the consolidation.

OSC also approved of DRGW's secondary analysis, which grouped all northern California traffic together, including that moving on the southern and central corridors, and still found a concentrated post-consolidation market.

OSC concludes that there is no need for the Commission to resolve all the differences of methodology and opinions to estimate the precise magnitude of the increase in UP's market share that will occur as a result of the consolidation, given the obvious reductions in the number of transcontinental routes.

[680] MIDWEST NORTH/SOUTH TRAFFIC

OSC's primary concern in this market is the ability of UP to favor its long haul with MP at Kansas City and thus foreclose other carriers, such as MKT, from providing effective competition to MP in this market. OSC notes that the potential for such foreclosure is great, as illustrated by Table 10 in this decision.

OSC asserts that CNW may also preferentially divert traffic to MP at Kansas City, since the "special relation-

ship" between UP and CNW makes it highly probable that CNW will want to cooperate with UP wherever it can.

OSC asserts that these diversions to MP by UP and CNW at Kansas City will limit competition and will not provide the public better rates or services.

APPLICANTS

Applicants present a broad-brush case in an effort to show that their proposed consolidation, like other end-to-end rail merger proposals decided recently by the Commission, will yield substantial improvements in price and service competition and thereby take advantage and fulfill the goals of the Staggers Act. Applicants present their proposed large corporate size, and their post-consolidation ability to offer single-system service in competition with all western rail and motor carriers, as a procompetitive benefit, and not as a competitive harm. Applicants note our statement in *BN-Frisco* that "increased competition will result from * * * a system which greatly increases the territorial penetration of both carriers."

Applicants assert that in the long run the proposed consolidation will lead to increasing procompetitive effects, to the benefit of shippers and receivers, and not to competitive harms such as raised prices and deteriorating service levels, as alleged by protesting carriers and certain other parties. Applicants assert that cost reductions directly related to the consolidation will impart downward pressure on the new system's rate structure in all markets where the applicant carriers now compete. Eventually, applicants claim the increased competitiveness of the consolidated system can be expected to spur the competitive efforts of other carriers, leading to the intensification of rail competition in ways that are not now perceived.

Applicants state that our investigation of potential harm from a consolidation is a focused inquiry. Harm to the public can only come about if a consolidation causes a significant reduction in competition or harm to essential transportation services. Applicants suggest the Commission is not interested in trivial or speculative possibilities of a lessening of competiton, only in a significant lessening or reduction.

In addition to a discussion aimed at demonstrating the proposed consolidation, as primarily an end-to-end merger will have global procompetitive effects, the applicants separately analyze several rail markets where other parties have alleged the consolidation will lead to competitive harms. In each market applicants emphaticaly [sic] state that intermodal competition is a major force competing for rail traffic flows, and that any assessment of the proposed consolidation's impact on competition must necessarily broaden its scope of inquiry to include truck, barge, and pipeline in the relevant product market.

RELEVANT PRODUCT MARKETS

Applicants make extensive use of modal split statistics in an attempt to show that barges, pipelines, and, particularly, trucks effectively compete with railroads for a significant portion of rail traffic. They note the decline of the railroads over time relative to other modes in the competition for traffic. In 1945, railroads were responsible for about two thirds of all [681] intercity ton-miles. By 1980, the rail share had dropped to less than two fifths. Nonrail modes carry more than fifty percent of industrial goods transported in every census division of the US. Applicants are particularly concerned by the ability of motor carriers to competitively encroach upon the rail system's traffic base through use of superior service levels related in part to their ability to offer single-system service. They assert that the core of the competitive advantage enjoyed by trucking remains its serv-

ice dimension, particularly as expressed through the freedoms of single-system operations. For example, special commodity carriers have skillfully penetrated lucrative long-haul, truckload markets by expanding the number of commodities they carry and the range of points, states, and regions which they serve. General freight motor carriers, in part due to the growing use of specialized commodity divisions utilizing owner-operators, have greatly increased their rail competitive truckload capacity. Strong motor competition exists in auto and refrigerated products (both more than $1 billion in motor revenues in 1978) and building materials.

Applicants allege that trucks are now competitive with railroads even over transcontinental routes, and point to Yellow Freight, with an average length of haul of 1,105 miles, as one of sixteen motor carriers with a 1978 average length of haul greater than a thousand miles operating in the applicants' service area.

They suggest that the Motor Carrier Act of 1980 will increase the degree of motor competition faced by railroads, since its permits motor carriers to cover larger geographic areas and longer distances, enter new markets easily, carry many different commodities, select more direct routings and points to be served, fill backhauls more readily, change rates flexibly, and expand the types of services they offer. Applicants note that this is undoubtedly good news for shippers, but a stiff competitive challenge for the railroads.

On our request applicants presented numerous relatively disaggregated modal split statistics for a large number of commodities between relevant BEA's. Applicants suggested that these figures indicate that the non-rail modes have demonstrated their ability to compete with pronounced effectiveness in the transportation of a broad range of freight over extended as well as shorter hauls and that non-rail transport alternatives are avail-

able to, and utilized by, shippers for a wide variety of significant commodity flows.

As a caveat, applicants' note that in certain specific geographic pairings and for some specific commodity types (long hauls of certain ores, coal, some mineral movements, and the like) it is, of course, true that the rail mode may offer important logistical advantages which shippers may find significantly more attractive than those offered by the other modes. Nonetheless, applicants claim that the railroads have a competitive advantage for only a relatively small share of their traffic. For example, bulk commodities represent a very small part of transcontinental traffic to and from northern California, perhaps less than 5 percent.

NORTHERN CALIFORNIA TRANSCONTINENTAL TRAFFIC

Applicants argue that from the perspective of this consolidation the relevant market involving northern California transcontinental traffic includes all practical rail and non-rail options available to shippers. Applicants emphasize their view that rail traffic through the central corridor is not a separate market. They assert that in the central corridor any attempt by UP to raise prices above competitive levels would simply result in the loss of traffic to DRGW, Santa Fe, SP's southern routes, motor carriers, and other product sources. The same result would attend any effort by the new system to degrade service.

Applicants' case for the inclusion of intermodal competition has been presented above. In arguing for inclusion of southern and central corridor rail routes in a single market, applicants present data (Table I, below) showing transcontinental traffic flows to and from northern California. Applicants note that this table shows high market shares for SP's and [682] Santa Fe's southern corridor routes to all regions. (It is highest for South Central and ranges between 31 percent and 68

percent for all other regions except North Central). Applicants state that these market shares show that the central corridor is but one route for transcontinental traffic moving into and out of northern California. Despite their circuity, applicants assert that southern corridor routes are competitive for this traffic. For example, they note that Santa Fe is regarded as the pacesetter on time sensitive traffic between northern California and the major eastern connections in Chicago.

Applicants have expressed a willingness to accept a trackage rights condition for DRGW to Kansas City, and suggest that with this acceptance the scope of the competitive inquiry in this case has been substantially narrowed. Applicants state that DOT and DOJ recommended these conditions because of a perceived reduction in competition resulting from consolidation of "parallel" UP and MP routes through the central corridor.

Applicants present detailed evidence in attempting to demonstrate that each of the major northern California traffic (commodity) flows is subject to vigorous competition from southern corridor rail routes, from other modes, and from other sources, all of which applicants state will be unaffected by the consolidation. Therefore, applicants assert that once DRGW is granted its tackage rights request, the merger will not significantly reduce competition for northern California traffic.

Applicants also discuss the impact of the proposed consolidation in markets other than for northern California transcontinental traffic. For example, they note that UP and MP both have routes between Kansas City and Omaha. However, the UP route is 60 percent longer than the routes of the two primary competitors in that market, BN and MP.

In Kansas, the consolidation will put the applicants' east-west lines under common control. However, they

note that many Kansas shippers and the State of Kansas support the consolidation. Applicants suggest that they received this support in part because currently UP and MP do not directly compete for Kansas grain shipments. Of the 329 separate locations in Kansas at which rail traffic originates or terminates, only seven were served in 1979 by both UP and MP; and at four of those locations, at least two other railroads provided service. The three Kansas points served exclusively by UP and MP accounted for only one percent of all Kansas rail traffic.

Thus applicants claim that in Kansas UP principally competes with Santa Fe, BN, and SP for movements to the West Coast, while MP principally competes with Santa Fe, BN, and MKT for movements to the Gulf. They assert that the major effect of the consolidation in this region will be to expand competitive options for UP and MP shippers by providing them with single-system access to both Gulf and Pacific ports.

Applicants also state that the consolidation will not lead to a lessening of competition for north-south traffic to the Gulf. They note that, in addition to themselves, BN and Santa Fe would continue to offer single-system competitive alternatives, as will numerous interline rail alternatives. Furthermore, they assert that nonrail modes play a significant role in handling traffic in this corridor, and that transportation rates are governed not by railroads but by the low-cost water carriers. Finally, applicants dispute contentions raised by other parties that the consolidated system would achieve and exert "market power" over traffic moving through Kansas City and currently interlined with MKT.

Applicants also address SP's contention that the consolidation will lessen competition for traffic moving north/south along the west coast from the Pacific Northwest to Los Angeles, where the UP and WP have roughly parallel routes. Applicants state that the UP route is 700

miles longer than SP and Bieber routings and is not a major factor in this market. They assert that SP has the best route and the largest share of rail traffic, and there also exists extensive motor and water competition, with more than half the traffic in this corridor handled by nonrail carriers.

[683] Finally, applicants claim that the proposed consolidation will not lessen competition for southern California transcontinental traffic, and dispute the allegation that MP's El Paso and Sweetwater interchanges with SP and Santa Fe will not remain competitive with the consolidated system's service. Applicants state that they have no plans to close these interchanges and assert that, to the contrary, they will have a strong incentive to maintain those gateways since they are efficient and the most profitable routes for certain traffic.

Several parties argued that the proposed consolidation would reduce competition because the applicants would use their "market power" to divert traffic to their new singe-line long-haul and foreclose non-applicant interline partners from competing. Santa Fe alleged the proposed consolidation would produce competitive harms by reducing shippers' routing options. We summarize applicants' critique of each of these in turn.

Traffic Divisions and Foreclosure of Competition

Applicants assert that if an end-to-end consolidation did not solicit its new single-system routings, there would be little if any reason to approve it. To assess the impact of such actions on competition, applicants suggest they be analyzed in practical terms on the basis of whether the new system's competitors will be in a position to compete independently of the new system. They assert that this will clearly be so for transcontinental northern California traffic, presuming a grant of the DRGW trackage rights. Applicants note that Santa Fe will have its

own southern corridor route, and that SP and DRGW can interline in the central corridor. Furthermore, applicants state that SP has 7,000 exclusively served shippers in northern California, and that for northern California traffic the applicants are dependent on SP because it originates and terminates such a substantial portion of the available traffic in California and Oregon.

Applicants assert that most traffic diversions to the new system will result from improvements in price or service, and that such diversions do not create competitive harms, but are procompetitive and are themselves a major public benefit of the proposed consolidation. Therefore, applicants assert that any diversion related increases in market shares are procompetitive and do not indicate an increase in market power. Rather, applicants suggest they indicate an understandable shipper preference for better service.

SANTA FE'S ANALYSIS OF SHIPPERS' ROUTING OPTIONS

Applicants attack Santa Fe's assertion that the proposed consolidation is primarily a horizontal acquisition whose major competitive effect will be to limit shippers' routing options through applicants' preference for new single-line routes over prior interline permutations. Applicants assert that where railroads meet as end-to-end connections they are not in a competitive relationship.

Applicants state that Santa Fe's reasoning implies that competition and shippers' options are increased by maintaining a fragmented rail industry with a large number of interline routes, and that end-to-end mergers designed to rationalize the rail network are anticompetitive and prejudice shippers because they reduce the number of these competitive options. However, applicants assert that in an end-to-end merger shippers gain new single-system options, and this leads to more effective competition, not less.

TABLE 1

Northern California Transcontinental Traffic

	Southeast		Northeast			Central			Total Northern Calif. Transcon. Carloads	
	Westbound									
	South	North	West	New England	Mid Atlantic	South	North	Mid		
				Percent						
ATSF	28.1	26.6	42.0	39.6	29.2	34.8	22.7	20.0	30.8)	
SP	39.5	32.1	3.3	3.8	14.0	50.5	0	4.6	18.0)	51.8
SP-UPRR	12.3	13.1	30.3	30.2	19.9	2.6	38.6	39.7	22.9	
SP-DRGW	7.0	3.3	8.2	1.9	7.6	5.3	6.8	19.3	8.3	
WPRR-UPRR	3.5	15.2	6.8	11.3	13.1	0.6	19.3	11.2	7.7	
WPRR-DRGW	3.5	7.6	7.7	7.6	11.9	4.2	0	3.6	6.4	
BN	0	0	.3	0	.4	0	10.2	.3	.6	
				Eastbound						
ATSF	25.1	20.1	39.7	31.4	25.7	29.9	14.9	31.4	29.4)	
SP	42.0	32.6	8.5	15.3	14.5	47.9	1.8	6.5	20.4)	49.8
SP-UPRR	17.2	16.7	28.6	28.8	35.9	6.3	39.5	26.5	25.4	
SP-DRGW	5.1	8.3	5.6	4.2	5.2	2.4	14.9	13.9	6.6	
WPRR-UPRR	6.4	14.6	7.4	10.2	12.2	2.1	10.5	8.2	8.5	
WPRR-DRGW	2.6	4.9	7.2	5.9	6.0	7.5	5.3	12.2	6.8	
BN	0	0	.5	.9	.2	0	12.3	0	.9	

[685] SP

SP alleges that Commission approval of the proposed consolidation will enhance and extend UP's (current) dominant market position in the central corridor, particularly with respect to transcontinental traffic moving between northern California and Oregon, on the one hand, and the upper midwest and the northeast, on the other. The market power that would accrue to UP would permit the consolidated system to unilaterally control routings at the Utah gateway and to control rates and service levels in the central corridor, to the detriment of shippers and other carriers.

In reaching this conclusion, SP first determines that rail transportation alone is the relevant product market in this proceeding, and that certain traffic in the central corridor is the relevant geographic market. It then assesses the impact of the proposed consolidation on competition in that market.

PRODUCT MARKETS

SP agrees with the analyses and conclusions of DRGW and DOJ concerning relevant product markets. These parties refuted applicants' use of modal split statistics to show rail/truck competition, and relied instead on econometric studies of rail/truck demand and other sources to show that, for certain commodities and lengths of haul relevant to this proceeding, motor carriers do not act as an effective competitive restraint on railroads.

SP added to these parties analyses by referring to the testimony of forty shippers, many of whom were sponsored by the applicants. SP states that these shippers have noted in the record that they do not use extensive motor carrier service for long hauls, either because of the greatly increased costs or the sheer impracticality for their particular commodities. For example, SP alleges that if its exclusively served shippers were required to

direct their rail traffic from SP exclusive points to motor carriers, their transportation costs would increase by an average of seventy percent.

SP also presents its own modal split statistics, restated here at Table 1. SP states that this data shows that, in each of 18 transcontinental freight markets, the rail market share was over eighty percent, suggesting that for a very large volume of rail freight, truck competition is ineffective.

SP also asserts that trucks are becoming less competitive with railroads over time. SP states that the national trend of increasing motor carrier participation in total transportation markets has reversed since 1978, due in part to rising fuel costs. And, SP notes that fuel costs are expected to escalate, suggesting that the ability of motor carriers to compete with more fuel efficient railroads will continue to decline.

RELEVANT GEOGRAPHIC MARKETS

SP states that it agrees with DOJ that individual origin and destination points constitute relevant geographic markets to assess the impact of the consolidation. However, while DOJ defines markets in terms of origin/destination county pairs, SP defines them in terms of origin/destination regions.

SP defines three western regions as origin or destination points for transcontinental traffic, defined as traffic that crosses the Rocky Mountains: Oregon/Washington, northern Calfiornia, [sic] and southern California. SP then defines three eastern regions as origin and destination points for trancontinental traffic: the Great Plains, and Northeast, and the Southeast. These six regions are used to define nine transcontinental markets in each direction (3 x 3), for a total of eighteen transcontinental markets.

[686] Using the two percent sample of 1979 transcontinental rail carload traffic filed by carriers in this

proceeding, SP develops several sets of tables for these 18 transcontinental markets. First, SP presents the percentages of carload traffic participated in by the various carriers. Then, SP shows how these carriers' participation shares would change if the merger were consummated, without taking account of traffic diversions. Finally, SP shows how these participation shares would be affected by the applicants' diversion studies and by the diversion studies of the protesting carriers.

SP concentrates its analysis on the impact of the merger on competition in the central corridor. It is in agreement with DRGW and DOJ that the relevant markets consist of transcontinental transportation of specific commodities by rail through the central corridor between points in northern California and southwest Oregon on the [one] [sic] hand, and the Great Plains and Northeast, on the other.

SP asserts that these are separate and distinct markets from origin and destination points located in other areas and/or using other corridors. BN's northern corridor route is not competitive with the central corridor for this traffic, since BN has only a one percent share of traffic between northern California and the Great Plains or the Northeast and only a ten percent carload share for traffic between Southwest Oregon and the Great Plains or the Northeast. SP also notes that, while ATSF carries 29 percent of Northern California traffic on its southern corridor route, the largest part of this traffic is accounted for by a few commodities (intermodal, wine, canned goods, and sugar) shipped from limited locations. SP argues that for two-thirds of northern California traffic, ATSF has a minor share—only 11 percent—and is therefore not an effective competitive factor.

SP asserts that its own southern corridor routings, even after the Tucumcari acquistion, are not a major competitive factor for Northern California originations,

with only 12 percent of such traffic and only about one percent of SP's Northern California traffic moving on the Tucumcari route.

Thus SP concludes that the central corridor is a separate and relevant market for important traffic flows, and that for many shippers the next best alternative to utilizing the central corridor is either paying higher rates to motor carriers or having increased transit times through the Southern corridor.

IMPACT OF THE PROPOSED CONSOLIDATION ON COMPETITION IN THE CENTRAL CORRIDOR

SP notes that today central corridor markets are characterized by high levels of concentration and insurmountable barriers to entry. SP's Table 2, below, shows the current dominant market share of traffic participated in by UP in the central corridor.

SP asserts that UP's dominant position is due to the natural superiority of the UP route, in terms of both service and costs. It is this natural route superiority that SP alleges will precisely measure UP's "latitude of exploitation" in a post-consolidation environment.

SP asserts that DRGW, its only central corridor interline partner other than UP, has routes that are 8 percent to 13 percent more circuitous than UP's route, with greater curvature and grade than UP, so that the DRGW routes must be more costly and/or slower than the UP route. Thus SP asserts that DRGW acts as a "pricing umbrella" for UP in the central corridor.

SP notes that in 1980 it interchanged 70 percent of its traffic in Utah with UP and 30 percent with DRGW. However, it asserts that UP obtains 78 percent to 98 percent of high rated, time sensitive traffic (such as

perishables, autos and parts, and freight forwarder traffic) in comparison to DRGW.

SP presents evidence submitted by DRGW and by applicants (Table 3) to show the extent that UP's dominant central corridor position will be enhanced by the consolidation. [687] These data show UP's post-consolidation participation shares in various central corridor markets to be at least 85 percent. And SP presents its own estimates in Table 4 that show UP's market shares (incorporating protestants' diversion studies) over all routes (including the southern corridor) for traffic moving between Northern California and both the Northeast and the Great Plains. UP's post-consolidation participation share in these broadened markets ranges from 54.5 percent to 77.9 percent, assuming the validity of protestants' diversion studies. Finally, SP presents market share data for transcontinental traffic flows between Northern California and all regions and between Oregon and all regions (Table 5) and between Northern California and Oregon (combined) and all regions (Table 6).

SP asserts that the applicants' share of traffic in these markets—no matter how it is calculated—is of such magnitude the proposed consolidation, measured against traditional antitrust precepts, must be considered a violation of the antitrust laws. SP translates these market shares into Herfindahl indices to demonstrate that, using the central corridor alone or all northern California traffic, the consolidation would be in violation of recent DOJ merger guidelines meant to be utilized in cases involving application of section 7 of the Clayton Act. These estimates of Herfindahl indices appear in Tables 7 and 8.

SP asserts that UP will utilize its dominant market position in the central corridor to divert traffic at the Utah gateways, and that, at Ogden, DOT's market power diversion analysis is consistent with SP's competitive analysis.

SP states that it will have limited capability to offer competitive resistance to UP. It suggests its southern corridor routes are not competitive with the central corridor routings for northern California traffic, since they are more circuitous and less fuel efficient. SP states that an SP/DRGW route will not be adequate competition for UP, because of DRGW's circuity and limited capacity, and because DRGW's major eastern connection is MP, which it will lose as a friendly connection after the merger.

Whether DRGW reaches Kansas City via trackage rights or via joint line connection does not alter the cost disadvantage of the present DRGW line, and SP does not regard DRGW as a feasible, long-run competitive alternative to the UP in the central corridor. SP notes that for both northern California and Oregon traffic, SP-DRGW-Other (than applicants) routes captures an average of less than 5 percent of the transcontinental traffic.

SP asserts that UP would be able to unilaterally exert its post-consolidation market power in the central corridor to manipulate prices to the detriment of competition through the use of price squeezes, to deliberately degrade service, and to chill competition among railroads. It is the increased market power through end-to-end consolidation, with the potential of foreclosure of SP at Utah, that SP highlights in its analysis. SP suggests that, since MP and WP connect with DRGW and SP in competition with UP, the consolidation cannot accurately be described as end-to-end.

SP also anticipates adverse "parallel" competitive effects on local traffic in the central corridor related to the proposed merger of the parallel MP and UP, on southern California traffic currently moving UP/MP in the central corridor in competition with MP southern corridor routes, and on north/south traffic on the west coast where UP parallels WP.

[688]

TABLE 1

Market shares
Rail vs. Truck
18 Transcontinental freight markets

Market	Rail share percent	Truck share percent
No. California to Northeast	80.7	19.3
No. California to Southeast	85.8	14.2
No. California to Great Plains	82.1	17.9
So. California to Northeast	59.8	40.2
So. California to Southeast	67.3	32.7
So. California to Great Plains	75.2	24.8
Oregon-Washington to Northeast	91.0	9.0
Oregon-Washington to Southeast	88.5	11.5
Oregon-Washington to Great Plains	93.3	6.7
Weighted Average	82.9	17.1
Northeast to No. California	78.2	21.8
Northeast to So. California	72.1	27.9
Northeast to Oregon-Washington	67.2	32.8
Southeast to No. California	74.3	25.7
Southeast to So. California	82.8	17.2
Southeast to Oregon-Washington	88.2	11.8
Great Plains to No. California	85.4	14.6
Great Plains to So. California	89.2	10.8
Great Plains to Oregon-Washington	90.9	9.1
Weighted Average	83.2	16.8

Total tonnage measured = 599,000 equivalent carloads.

[689]

TABLE 2

UP's present share in various central corridor railroad traffic

Traffic Segment	Data Source	UP's Carload Share	
		East-Bound	West-Bound
		Percent	
(1) No. California and Great Plains/Northeast/Southeast	Nelson, SPT-HVS-107 at 12-13.	80.8	86.6
(2) East of Denver	Posner, DRGW-HVS-11 at 38.	78.0	75.7
(3) No. California Transcontinental Traffic	Posner, DRGW-HVS-11 at 38.	65.9	65.8
(4) No. California Transcontinental Traffic	Barber, UP-HVS-50 at Tables 7 and 11; SPT-H-56.	71.8	67.7

TABLE 3

Applicants' combined market share in various central corridor railroad traffic

Traffic Segment	Data Source	Pre-Consolidation Participation Share	
		UP	UP-WP-MP
		Percent	
(1) East of Denver	Posner, DRGW-HVS-11 at 38.		
East-Bound		78.0	85.5
West-Bound		75.7	85.1
(2) No. California Transcontinental Traffic	Posner, DRGW-HVS-11 at 38.		
East-Bound		65.9	89.5
West-Bound		65.8	86.1
(3) No. California Transcontinental Traffic	Barber, HVS-50 at Tables 7, 11; SPT-H-56.		
East-Bound		71.8	92.6
West-Bound		67.7	89.2

[690]

TABLE 4

Effects of merger on concentration; protestants' traffic diversion studies

Traffic Segment	Data Source	UP Market Share	
		Pre-Consolidation	Post-Consolidation
		Percent	
(1) Transcontinental Traffic, All Routes, between No. California and Northeast	Nelson, SPT-HVS-107 at 17, 32.		
East-Bound		42.7	54.5
West-Bound		47.2	63.8
(2) Transcontinental Traffic, All Routes, between No. California and Gt. Plains	Nelson, SPT-HVS-107 at 18, 33,		

TABLE 5

Applicants' participation shares of transcontinental traffic between Northern California/Oregon and specified Eastern regions—1979

	New England	Mid-Atlantic	West-Northeast	North-Central	Mid-Central	South-Central	North-Southeast	South-Southeast
				Percent				
Northern California:								
UP*	41.5	44.7	37.4	54.5	44.3	5.5	30.3	21.0
MP and/or WP**	7.9	10.8	10.8	6.0	13.8	7.4	10.6	7.6
Total UP-MP-WP	49.4	55.6	48.3	60.5	58.1	12.9	40.9	28.6
Oregon:								
UP*	44.6	52.5	60.7	37.4	58.0	37.5	52.3	36.7
MP and/or WP**	7.7	7.5	2.3	0.4	3.8	8.4	6.3	4.1
Total UP-MP-WP	52.3	60.0	63.0	37.8	61.7	45.8	58.5	40.8

TABLE 6

Applicants' participation shares of transcontinental traffic between Northern California/Oregon (Combined) and specified Eastern regions—1979

	New England	Mid-Atlantic	West-Northeast	North-Central	Mid-Central	South-Central	North-Southeast	South-Southeast
				Percent				
UP*	42.3	45.9	44.2	45.2	48.8	13.0	38.1	27.1
MP and/or WP**	7.9	10.0	8.3	3.0	10.5	7.7	9.1	6.3
Total UP-MP-WP	50.2	55.9	52.5	48.2	59.3	20.7	47.2	33.4

* *All* routes in which UP participates, including those with MP and/or WP. ** All MP and/or WP routes, *except* those in which UP also participates.

[692]

TABLE 7

Effects of the consolidation on concentration in the central corridor

1979

Traffic Segment	Data Source	Herfindahl Index		Differential (3)-(2)
		Pre-Consolidation	Post-Consolidation	
	(1)	(2)	(3)	(4)
Central Corridor, East of Denver	Posner, DRGW, HVS-11 at 30.			
East-Bound		6568	7520	952
West-Bound		6321	7464	1143
No. California Transcontinental Traffic through Central Corridor.	Posner, DRGW, HVS-11 at 30.			
East-Bound		5506	8120	2614
West-Bound		5499	7606	2107
No. California Transcontinental Traffic through Central Corridor.	Barber, UP-HVS-50 at Tables 7, 11; SPT-H-56.			
East-Bound		5950	8630	2680
West-Bound		5627	8073	2446

* Assumes all traffic handled by WP and MP which passes through central corridor is diverted to UP.

TABLE 8

Effects of consolidation on concentration: Selected traffic flows

Traffic Segment	Data Source	Herfindahl Index		Differential (3)-(2)
		Pre-Consolidation	Post-Consolidation	
	(1)	(2)	(3)	(4)
Transcontinental Traffic, All Routes, between No. California and Northeast.	Nelson, SPT-HVS-107, at 17, 32.			
East-Bound		3028	3789	761
West-Bound		3416	4713	1297
Transcontinental Traffic, All Routes, between No. California and Gt. Plains.	Nelson, SPT-HVS-107, at 18, 33.			
East-Bound		3077	3549	472
West-Bound		4833	6236	1403

Santa Fe adopts a modified section 7 approach in analyzing competitive effects of the proposed transaction. It argues that the shift from service competition alone to full price and service competition, brought about by the Staggers Act, implies that rail consolidation should now be analyzed according to the more thorough approach followed by the courts in section 7 cases. Santa Fe asserts that deregulation increased the appropriateness of looking to statutes applicable to the nonregulated sector, such as section 7 of the Clayton Act, to provide a framework for analyzing the competitive effects of a railroad merger.

Following the section 7 methodology, Santa Fe defines rail traffic as the relevant product market, thus excluding intermodal competitors. Santa Fe is one of several parties to refute applicants' use of modal split statistics in attempting to show a high degree of rail/truck competition. Santa Fe asserts that, just because some shippers use motor carriers in a given market, it does not follow that all shippers, even of the same commodity, would find motor carriers a reasonably competitive alternative. Within the context of section 7, Santa Fe asserts that rail traffic in this proceeding would clearly qualify as an "economically significant submarket" where the effect of the transaction may be substantially to lessen competition.

Finally, Santa Fe notes that the rail merger standard added by the Staggers Act, 49 USC 11344(b)(5), requires analysis of competition among *rail* carriers.

Santa Fe presents two types of evidence concerning claimed competitive harms from the proposed consolidation. First, empirical data on shippers' routing alternatives and on market shares are presented. These take the form of Santa Fe's estimates of percentages of routes eliminated in specific rail markets and of market shares of applicants and other competitors in each market. Sec-

ond, Santa Fe alleges certain post-consolidation actions UP would take to reduce competition.

Santa Fe claims that the proposed consolidations solely involves directly competitive routes, and should be analyzed entirely as horizontal acquisitions. Santa Fe asserts that connecting railroads are not engaged in a traditional customer-supplier relationship but are instead joint venturers. Thus in Santa Fe's view this is not a vertical consolidation. It asserts that two or more of the applicant railroads currently compete in all major transcontinental freight markets. These markets are examined individually in great detail. Santa Fe summarizes its results in Table 1, below. Santa Fe begins its analysis with its own listing of all generally competitive rail routes in the rail transportation markets affected by the proposed consolidation. Only those routes generally solicited by carriers were included. Santa Fe uses its judgments to quantify the number and percentage of competitive rail alternatives that would be eliminated in these markets. Table 1 shows, utilizing Santa Fe's methodology and judgments, the number of existing shippers' routing alternatives would be reduced by at least 25 percent in each of the ten markets included in the Table, and by at least one-third in eight of them.

Santa Fe is very skeptical as to the reliability of the market share data presented in this proceeding due to the limitations of the background data, which are either the One Percent Waybill Sample or the two percent sample of transcontinental traffic developed for this case. Santa Fe feels that the two percent transcontinental sample is incomplete, since it only includes traffic handled by five railroads. And both the one percent and two percent samples may represent significantly more or less than one percent or two percent of the traffic handled by a railroad in any specific market to be analyzed. Santa Fe notes that no standard errors or coefficients of variation are presented, and that the market share data "is

the result of a division of one uncertain estimate by another uncertain estimate."

[694] Despite these qualms, Santa Fe believes that market share data, even if somewhat unreliable, show post-consolidation concentration levels so high as to provide compelling evidence that UP would have an excessive share in relevant markets which would allow it to dominate many important transcontinental freight markets.

Santa Fe has not presented its own market share data, but instead relies on the material presented by SP. SP utilizes different market definitions than does Santa Fe in its earlier analysis of shippers' routing alternatives. One of the SP tables, utilized by Santa Fe, is included here as Table 2. It shows post-consolidation market shares without taking account of traffic diversion studies. Santa Fe also presents another of SP's tables that shows market share data based on the traffic diversion studies of protesting carriers, presented here as Table 3. The latter shows a significantly higher post-consolidation market share to UP.

Santa Fe then utilizes SP's data to conclude that the proposed consolidation would be in violation of numerical market share guidelines utilized by the courts in section 7 cases or promulgated by the Department of Justice for use in section 7 cases.

Santa Fe also argues that after the consolidation UP will act to reduce competition. Santa Fe asserts that after the Staggers Act the size of a railroad's service territory can be equated to its market power, and that UP would utilize its broadened territory and market power to disadvantage its competitors. Santa Fe notes that UP intends to use its substantial marketing advantage of so many long single-line routes, which is made even greater by the Staggers Act, to increase its profitability at the expense of competing carriers, and that the ability to price will be the method UP will use to take business away from competing rail carriers.

Santa Fe asserts that, in attempting to compete against the consolidated system, it would be caught in a downward spiral of declining traffic, forcing declining service quality and leading to further traffic losses, so that its long-term ability to continue to compete against the massive new UP system would be threatened. The downward spiral theory is also advanced by SP and is discussed in Appendix F-9, *supra.*

TABLE 1

Market	Current routes	Post-consolidation routes	Percent reduction
1. Southeast-Southern California	6	3	50
2. Southeast-Northern California	11	3	72.7
3. Northeast-Southern California	9	6	33
(via St. Louis)	6	3	50
(via Chicago)	7	5	28
(via Chicago, slow)	8	3	62.5
4. Northeast-Northern California	21	11	48
(via St. Louis)	9	3	67
(via Chicago)	15	8	47
(via Chicago, slow)	16	6	62.5
5. Chicago-Southern California	7	5	28
6. Chicago-Northern California	15	8	47
7. Mid-North Central-Southern California	5	3	40
8. Mid-North Central-Northern California	9	4	56
9. Texas/OklahomaPacific Northwest	6	2	67
10. Kansas City-Rio Grande destinations	4	3	25

[695]

TABLE 2

Transcontinental market shares

	UP	BN	ATSF	SP
Northeast-N. California	47.2	0.3	29.6	6.3
N. California-Northeast	42.7	0.3	27.6	12.4
Gt. Plains-N. California	66.5	1.6	1.4	4.4
N. California-Gt. Plains	41.6	1.9	27.0	5.3
Gt. Plains-S. California	51.9	1.0	25.6	18.1
S. California-Gt. Plains	38.6	1.3	34.9	21.4

TABLE 3

Post-consolidation market shares utilizing protesting carriers' traffic diversion studies

	UP	BN	ATSF	SP	DRGW
Northeast-N. California	63.8	0.3	23.9	5.5	6.4
N. California-Northeast	54.4	0.3	24.7	12.4	8.1
Gt. Plains-N. California	77.9	1.6	9.2	2.8	8.5
N. California-Gt. Plains	51.1	1.9	25.3	5.3	16.3
Gt. Plains-S. California	55.7	1.0	24.9	15.6	2.8
S. California-Gt. Plains	43.2	1.3	21.4	33.3	0.9

DRGW

The DRGW states that it is the UP's only competitor in the central corridor, handling about 35 percent of the traffic interchanged at Utah junctions. DRGW asserts that the proposed consolidation will limit its ability to compete with UP and therefore bring about a substantial reduction or lessening of competition in important rail markets.

As a frame of reference for assessing the competitive effects of the proposed consolidation, DRGW utilizes section 7 of the Clayton Act. DRGW is aware that the Commission is not bound by the antitrust laws, but states that the body of analysis that has developed in the adjudication and discussion of section 7 cases can be an important source of guidance to the Commission in applying the public interest standard to railroad mergers. DRGW asserts that this is even more so in the post-Staggers Act environment of today, since deregulation increases the appropriateness of looking to statutes applicable to the nonregulated sector, such as section 7, to provide a framework for analyzing the competitive effects of a railroad merger.

DRGW states that a section 7 analysis keys on the impact of a merger on seller concentration in relevant product markets, since high levels of concentration, espe-

cially in combination with barriers to entry, create a danger of facilitating noncompetitive accommodations among industry rivals, such as tacit collusion or conscious parallelism.

DRGW notes that no matter how rail markets are defined, there are very few railroads operating in the western U.S. and only three (SP, WP, Santa Fe) soliciting traffic in northern California. This by itself indicates to DRGW that we must very carefully assess the competitive impacts of the proposed consolidation.

[696] In applying the specific principles of section 7 to a merger, DRGW notes that the first step is to define a relevant market (or markets) in which to appraise the merger's competitive effects. DRGW states that a relevant market is the "area of effective competition," and has two dimensions, product and geographical.

RELEVANT PRODUCT MARKET

DRGW asserts that in section 7 cases determination of relevant product markets requires grouping together commodities that are "reasonably interchangeable" by either consumers or producers. Looking first at producers, DRGW states that it is reasonable to define a market for all commodities shipped by rail, since from the perspective of the railroad there are only minor differences in the manner in which different commodities are transported. Since it is relatively easy for railroads to switch from carrying one commodity to another, DRGW concludes that the most sensible way to assess a railroad's market power is to define a product market encompassing all commodities shipped by rail.

DRGW then goes on to examine whether, from the perspective of purchasers of transportation services, truck and rail services should be grouped in the same market. DRGW notes, with examples, that in section 7 cases it is rare for the courts to sanction the grouping of technically

different commodities in the same product market. However, DRGW disagrees with the rigidity of these court decisions, and asserts that the principle issue is not whether railroads and trucks provide technically different services, but rather the degree to which trucks are interchangeable with railroads in the eyes of shippers of freight and thereby constrain railroads' rates and services to competitive levels.

DRGW criticizes the use of modal split statistics by the applicants in attempting to show significant levels of rail/truck competition. DRGW asserts that, while applicants have shown growing truck shares over time and few commodities for which trucks do not account for at least thirty percent of total shipments, the applicants have drawn erroneous conclusions from this data. DRGW argues that applicants use of modal split statistics do not prove that the modes are *close* substitutes. DRGW suggests that in order to determine the degree of closeness of substitution, and hence directly respond to the question of whether railroads and trucks are in the same relevant market, applicants should have gone beyond modal split statistics to inquire as to what would happen to the volume of rail traffic if rail rates were to rise relative to motor carrier rates.

DRGW examines this issue by discussing a number of econometric studies. DRGW asserts that these studies indicate that rail-truck substitutability is low, particularly for low value, long-haul movements.

Looking to the future, DRGW speculates that even in submarkets where trucks today provide an effective competitive constraint on railroads, prospective increases in oil prices may some day put trucks at a comparative disadvantage.

DRGW therefore concludes that the proper approach for a competitive analysis that applies a section 7 framework to the proposed consolidation is to treat rail freight as a separate market.

RELEVANT GEOGRAPHIC MARKETS

DRGW asserts that the relevant geographic market for section 7 cases is the area in which providers of a particular product or service operate and to which purchasers can practically turn for such products or services. DRGW states that, used in this section 7 context, a relevant geographic market does not have to include all buyers from the merging [697] firms, so that a showing of anticompetitive effects in any line of commerce (or on any group of consumers) is sufficient for the courts to hold a merger unlawful under section 7.

DRGW notes that the UP, MP and WP all operate in the central corridor, and begins its assessment of the proposed consolidation's competitive impact by measuring the applicants' market share in the central corridor. DRGW suggests that central corridor rail transport is in effect a three stage process. Eastbound traffic moves first to Utah over either the SP or WP, then over the Continental Divide on the UP or DRGW, and then east toward Omaha/Kansas City on the ATSF, MP, BN, or UP.

When viewed as a three stage movement, the principal horizontal or parallel effect of the proposed consolidation is the overlap on the easternmost leg between the UP and the MP. The ability of the UP to exert market power over traffic moving through Cheyenne is constrained at present by the ability of shippers to switch to the DRGW, using the ATSF, BN, or MP as an eastern connection, but the proposed consolidation would eliminate the MP as an independent connection to the DRGW alternative and thereby enhance the UP's market power.

DRGW assesses the significance of this horizontal effect using data from the 1979 One Percent Waybill Sample. This data is exhibited in Tables 3 and 4 in the Decision.

DRGW asserts that market share statistics of the magnitude exhibited in Tables 3 and 4 are extremely large

by conventional antitrust standards, and presents examples where the courts have turned down mergers because of market shares as low as 30 percent.

DRGW notes that Tables 3 and 4 and its related analysis ignore the proposed consolidation between the UP and the WP, and presents an alternative approach to measuring the consolidation's impact on market shares in the central corridor. This alternative takes through routes as the unit of analysis and emphasizes the effect of the consolidation on the number of independent routes available to shippers. The data utilized in this second approach is exhibited in Tables 5 and 6 in the Decision.

DRGW notes that the applicants' market shares exhibited in Tables 5 and 6 are of the same magnitude as those in Tables 3 and 4, and asserts that these market shares would ordinarily be considered a clear violation of section 7 of the Clayton Act, especially when considered in the context of the basic structural conditions of the rail market in question.

DRGW notes that thus far its analysis of competitive impacts has focused on measuring the effects of the proposed consolidation on central corridor traffic—the area in which all the applicants operate. However the second criterion of geographic market definition in section 7 cases is the area to which purchasers can practically turn for such products or services. DRGW suggests an antitrust court with authority over this proceeding would have to consider whether purchasers of central corridor railroad services can practically turn to other routes for service now obtained via the central corridor, whether consumers have the ability to switch to alternative sources of supply, and whether shippers can switch to alternative destinations.

DRGW states that the critical question in regard to area and route competition is the ease with which shippers and consumers employing central corridor railroads can switch to practical alternatives. DRGW suggests

that in this respect the problem of geographic market definition is identical to the problem of product market definition, where DRGW has asserted the issue was the ease with which shippers and consumers can switch among modes.

DRGW is aware of no empirical studies that shed light on the actual magnitudes of these area and route substitution effects. However, it notes that the central corridor has traditionally been considered a distinct market, and believes that this in and of itself may be an implicit statement about the feasibility of area and route substitution. Nonetheless, without conceding that extensive area and route competition exists, DRGW proceeds to assess [698] the competitive impact of the proposed consolidation within a geographic market that assumes extensive area and route competition. Data from the 1979 One Percent Waybill Sample are again utilized by DRGW and exhibited in Tables 8 and 9 in the Decision.

DRGW asserts that these Tables demonstrate that, even assuming extensive area and route competition, the proposed merger would significantly enhance UP's market power by increasing its participation share of tonnage originating in northern California from 19.4 percent to 32.2 percent and increasing its participation share of tonnage terminating in northern California from 21.4 percent to 32.3 percent.

DRGW notes that the effects of the proposed merger in this broader geographic market are naturally smaller than the effects in the central corridor. However, DRGW asserts that the market shares of the consolidated system indicated by Tables 8 and 9 are still of such a magnitude that a court would almost certainly find the merger in violation of section 7.

MKT

MKT alleges that the consolidation, if approved without conditions, will produce competitive harms in MKT's

prime market area, the market for rail services from Omaha/Kansas City to the Gulf.

Trucks are claimed not to be competitive with rail for a significant portion of rail traffic, and so should be excluded from a competitive analysis of the consolidation. This is because rail traffic heading north/south from and to the Gulf is composed primarily of bulk commodities for which rail has a competitive advantage. For example, chemicals and petroleum products account for about 70 percent of rail traffic shipped from Houston, Galveston, and other major Gulf ports to Kansas City & St. Louis. While other modes, such as trucks, water carriers, and pipelines, do carry these commodities, MKT argues that in reality the transport markets are highly segmented and that trucking is generally only a suitable alternative for low volume movements of specialty products, for short hauls, for time sensitive movements, and for local distribution of these commodities.

MKT notes that its principal commodities are grain, chemical products, soda ash, rock fertilizer, coal and other heavy loading commodities. It presents evidence that trucks are not an adequate competitive substitute for most of the lengths of haul involved. For example, MKT notes that if Farmland Industries, Inc. tried to utilize trucks for the movement of grain and fertilizer, there would be bumper-to-bumper trucks from Kansas City to the Gulf. Furthermore, MKT asserts that even trucking to an alternative railhead will not work in practice for grain shippers because of the additional cost. MKT asserts that even if the total amount of bulk traffic in this corridor for which effective intermodal competition is lacking its not large in comparison to total traffic flows for all modes, it is likely to be a large share of rail traffic. For a large number of shippers and types of commodities, rail retains a very substantial comparative advantage which justifies excluding trucks from the definition of the market.

MKT agrees with DOT and KCS that source competition will not be effective in ameliorating direct competitive harms in rail markets. MKT goes further and alleges that, in eliminating competition between UP and MP for movements of wheat from the Midwest to the Gulf, the consolidation will reduce source competition for both shippers and receivers of wheat.

In looking directly at the impact of the proposed consolidation on rail competition in its market area, MKT alleges three types of competitive harms.

(1) Horizontal Effects in Kansas and Nebraska

There will be a direct reduction in the number of routing alternatives available to shippers due to the elimination of competition between UP and MP over their roughly parallel [699] tracks that run among points in Kansas and Nebraska. Furthermore, MKT states it is in agreement with DOT that approval of the CNW/MP pooling agreement will, in effect, place a third route between Omaha/Council Bluffs and Kansas City under common control.

(2) Vertical Foreclosure at Kansas City

MKT agrees with DOT that foreclosure in the rail industry will take place when a jointline route is transformed by a consolidation from a route over which both carriers have an incentive to jointly offer competitive service into a route where one of the consolidating carriers no longer has such an interest because of a new long-haul developed through the consolidation. In such an instance, the number of competitive routing alternatives for shippers is reduced.

MKT alleges that this is probably what will happen at Kansas City as the consolidated company will understandably fail to cooperate with connecting carriers and thus fail to compete against its single-line service for

interline hauls involving MKT (or other railroads) to and from the Texas-Gulf region, including the Mexican gateways. MKT notes that it has no leverage to offset this tendency toward foreclosure, since 84.7 percent of its interchange with UP is delivered by UP to MKT and only 15.3 percent by MKT to UP.

(3) Global Effect on MKT

MKT delineates in detail in its traffic diversion studies how it will be weakened as a result of this and other recently approved consolidations. It notes that this weakening will in itself have an adverse effect on shippers as MKT becomes less of a competitive force in all rail markets in which it participates.

KCS

KCS asserts that the proposed consolidation will produce competitive harms, due primarily to an increased potential for abuse of market power by the applicants. In addition, KCS suggests the Commission has an affirmative duty to set procompetitive conditions on rail consolidations, even if they do not specifically address consolidation-related competitive harms. KCS provides analysis to justify certain conditions it has proposed under this standard.

KCS states that this proceeding, in its required findings, involves the essential elements of an antitrust case, so that section 7 of the Clayton Act provides a useful analytic framework. However, KCS also asserts that the nature of the railroad industry neither warrants nor requires literal application of section 7.

KCS states that the Commission, in assessing the competitive effects of a proposed consolidation as an element in its public interest determination, must take evidence in subsidiary areas of particular concern. These include relevant markets by commodity, relevant markets by

geography, the presence and potential for intramodal, intermodal, and intersource competition, and market power.

In discussing markets relevant to this proceeding, KCS states that two products are considered to be in the same market when they are reasonable substitutes for the buyer's purpose, and that, for any specific product, there is always a hierarchy of close, less close, and more distant substitutes. KCS suggests that closeness of substitution is measured, albeit imperfectly in practice, by the extent to which consumers shift their consumption in response to a change in relative price or quality.

KCS asserts that the same sort of reasoning applies to intersource competition, and that this form of competition is more effective when sources of supply are more numerous, when the cost conditions of alternative sources of supply are more homogeneous, when the transport costs from the alternative sources are closely bunched, when the delivered [700] products for the buyer's purpose are more substitutable, and when the share of transports costs in the delivered price of the product is higher.

KCS concludes that, while for certain locational and product characteristics, intermodal and intersource competition can somewhat constrain a railroad's market power, point-to-point railroad competition is the most effective constraint on market power abuses. Therefore, KCS states that intramodal competition is never irrelevant to defining a transport market, and point-to-point intramodal market shares are always relevant in assessing competition and efficiency.

KCS asserts that, if the Commission approves the proposed transaction, the potential for market-power abuse by the consolidated carriers will lead to competitive harms. KCS states that market power is not a function of a firm's historical behavior, but of a firm's ability to cause anticompetitive distortions in the marketplace.

Thus KCS asserts that the public interest question is not whether the consolidated company has taken advantage of its market power, but whether there is market power of which the consolidated company can take advantage. KCS refers to this as the potential for market-power abuses.

KCS states that the applicants have erroneously argued that market power is nothing less than the power to charge monopolistic prices. KCS asserts this definition is too restrictive and excludes Commission consideration of many potential market power abuses.

KCS asserts that the market power of the applicants has already manifested itself in connection with the proposed settlement with CNW. KCS enumerates other potential market power abuses by the applicants including the perceived threat that the consolidated system will use its enhanced economic power to discipline other railroads should they undertake competitive initiatives; the use of equipment to diminish the service of competitors and increase shipper dependency on the applicants; and influencing CNW to favor MP over alternative interline routings for export grains moving to the Gulf.

Finally, KCS states that, while as a concept, market power diversions are not necessarily contrary to the public interest, the public is worse off where such diversions result in more costly routings being utilized. KCS argues that such will be the case if this consolidation is approved, as applicants use their influence to divert traffic to less efficient routes.

KCS argues that the Commission has an obligation to fashion competitive remedies so that actions in the marketplace can counterbalance any potential for market power abuse, rather than relying on any subsequent legal remedies.

In addition to assessing alleged competitive harms that will result from the proposed consolidation and considering competitive remedies for those alleged harms, KCS asserts that the Commission has an affirmative duty to encourage the realization of new competition in determining the public interest in a railroad consolidation proceeding. KCS states that this responsibility is enhanced by the Staggers Act, which KCS interprets to require the presence, and, to the extent feasible, the enhancement of rail competition.

Thus KCS asserts that the imposition by the Commission of procompetitive conditions in a rail consolidation, even if not directly responsive to anticompetitive impacts, is not only justified but is affirmatively called for on efficiency grounds.

KCS suggests the Commission retains, via its broad powers in consolidation cases to impose conditions, the authority to ensure that adequate competition is present in the various links of the national rail network. If the Commission exercises these powers defensively by compensating only for consolidation-induced *reductions* in competition, KCS asserts it will forsake important opportunities to realize the social benefits of deregulation by augmenting competition where it is presently deficient. KCS claims that the conditioning powers are the Commission's most effective instrument for this public purpose, since nor- [701] mally there do not exist satisfactory incentives for railroads privately to negotiate arrangements which increase the degree of competition.

Following up on this suggestion, KCS presents evidence in an effort to show that competition is in some sense deficient in the market area from Kansas City to the Gulf currently served by MP, KCS, and other railroads. KCS bases this conclusion on a study of current and projected future levels of transport demand, since it is asserted that future transport demand should be an

essential consideration in the Commission's public interest finding in this case.

KCS suggests that use of four-firm or eight-firm market concentration ratios are not very useful in determining the current degree of rail competition, since railroad markets are usually quite concentrated in comparison with most other markets, so that these traditional ratios usually fall in the 90-100 percent range when applied to rail markets. As an alternative measure of the degree of competition, KCS suggests the reciprocal of the Herfindahl index, which is denoted as the Herfindahl numbers-equivalent. KCS notes that the Herfindahl index is the sum of squared market shares of all firms in a market, and the numbers-equivalent represents the number of equal sized firms that would yield the same value of the Herfindahl index as the actual pattern of market shares.

KCS estimates the numbers-equivalent values for those MP routes where it has requested traffic rights, and presents a methodology that is utilized to estimate the social benefits of increased competition on those routes. KCS concludes that, presently, competition in important markets and corridors in the Southwest is inadequate and this competitive deficiency will become increasingly serious for the foreseeable future into the next century. Furthermore, KCS asserts that the proposed consolidation of UP and MP will not improve competition or transportation services in the Southwest.

KCS notes that its diversion study shows about $100 million would be diverted to KCS if its trackage rights requests are granted by the Commission, and asserts that this figure is added proof of the serious need for competition in the region.

BN

BN's overwhelming competitive concern in this case relates to the transportation of coal. It does, however,

devote some limited effort to assessing the competitive impact of the proposed consolidation on noncoal traffic. We assess BN's coal arguments elsewhere in this decision.

BN does note that, while 49 USC 11344(b)(5), the "competitive factor" added by the Staggers Act to the Commission's required merger criteria, does not strictly apply to this consolidation, the legislative history of the Act makes clear the amendment was only intended to codify existing law.

BN expects the consolidation to eliminate competition between UP and WP for north/south traffic in the west and between UP and MP in transcontinental markets.

In discussing applicants' testimony with respect to competition, BN asserts that they simply provide an overview of problems faced by the railroad industry in general, and that no effort was made to address the particular markets served by the applicants or the economic and competitive impacts of the unification proposals.

BN urges the Commission to impose conditions which would preserve central corridor competition if the applications are approved.

BN presented its own expert economic testimony assessing the noncoal competitive impacts of the proposed merger. The testimony had three main sections. BN first presented evidence in support of the importance of vigorous intramodal competition, essentially arguing that rail service is the relevant product market in this proceeding. Then, it [702] explored the costs and benefits of mergers from an economist's standpoint. Finally, BN compared market shares before and after the consolidation assuming no diversion. It then employed a discrete choice model to estimate traffic diversion and again compared pre- and post-consolidation market shares. Both analyses show increased concentration as a result of the consolidation, and BN concludes that the consolidation will have significant anticompetitive effects.

BN's discrete choice model is based on shippers choosing routings that maximize their utility. In other words, shippers choose routings that they consider superior or most efficient for their purposes. A key decision variable for shippers in the model is the number of interlines. Thus, according to the model, any post-consolidation shifts in market shares are due largely to the superiority of the proposed merged routing from the perspective of shippers.

APPENDIX E-3

DOT market power diversion study

In conjunction with its competitive analysis, DOT performed a market power diversion study to measure reductions in competition. The study consisted of estimating (1) the lower bound of traffic potentially subject to diversion due to applicants' incentive to favor their new single system service instead of present joint-line service and (2) the leverage connecting carriers have to prevent these diversions. Traffic studied included UP-ATSF, UP-KCS and UP-MKT interchange traffic through Kansas City; UP-SP traffic through Ogden; MP-SP Traffic through El Paso and MP-ATSF traffic through Sweetwater.[1] Traffic meeting the following criteria was judged potentially divertible due to applicants' market power: (1) traffic moving from a point served by a dependent carrier and applicants to a point either (a) exclusive to applicants or (b) served by applicants or another

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[1] In analyzing diversions from SP due to appellants' increased market power over traffic routed MP-Pueblo-DRGW-Ogden-SP, DOT indirectly analyzed market power diversions from DRGW. DOT did not quantify DRGW's diversions. DOT did analyze DRGW's increased market power on carloads it originated resulting from a grant of its trackage rights. In that analysis, DOT found 5,000 cars, including 2,500 cars of coal, subject to DRGW's increased market power.

connection in single line service, (2) traffic moving from exclusive points on applicants' lines to points served by applicants and nonincluded carriers and (3) traffic applicants can bridge via routes not involving dependent carriers and for which dependent carriers have no other connection with which to offer alternative services. The 1979 one percent carload waybill sample served as the data base for the study. Major assumptions included: (1) routings of other carriers would be similar to that of the applicants in terms of transit time and circuity; (2) carriers serving common points would have direct access to shippers; (3) carload traffic would not be susceptible to TOFC movement; (4) publication of rates discouraging movement via MKT, KCS or ATSF would not be considered; and (5) movements handled by nonstudy carriers would not be considered. Results of DOT's analysis are as follows:

[703]

Carloads and revenues subject to market power diversion

Gateway	Carrier	Cars	Revenues	Leverage [a]
		(000)	*(millions)*	
Kansas City	ATSF	13.7	$8.0	3.61
Kansas City	KCS	6.6	5.0	2.54
Kansas City	MKT	22.6	20.1	6.49
Ogden [b]	SP	9.1	12.6	1.26
Ogden [c]	SP	53.8	39.6	1.26
El Paso	SP	4.6	8.1	Not given
Sweetwater	ATSF	6.2	9.8	1.83

a Leverage is measured as the ratios of interchange carloads received from applicants versus carloads delivered to applicants at the gateway studied.

b Assumes SP is competitive on time sensitive traffic.

c Additional carloads potentially divertible assuming SP is noncompetitive for time sensitive traffic.

DOT argues that ATSF, KCS, MKT and SP possess insufficient leverage to prevent these market power diversions and that as a result competition will be reduced.[2]

Applicants argue that because of intense intermodal and intramodal competition, DOT's study does not reflect market power in an economic sense (i.e. ability to charge monopolistic prices) and that the results are over stated due to DOT's failure to consider certain divertibility factors (i.e. equipment, shipper routing policies and reciprocal switching).

Protestants, principally KCS, argue that DOT's results are understated due to DOT's failure to consider (1) various market power factors (i.e. equipment, expanded resources, special services, coverage of multiple facilities of shippers, expanded market coverage, augmented solicitations capabilities, ability to respond to market changes promptly, contract rates and ability to cause market shifts); (2) nonapplicant interline traffic susceptible to market power diversions; and (3) traffic moving through gateways other than Kansas City.

In response, DOT argues that (1) the Commission should not ignore reductions in competition stemming from elimination of joint-routes regardless of other alternatives, (2) other modes do not provide effective competition for certain commodities and shippers and (3) KCS' market power diversion criteria are not measures of increases in applicants' market power.

The primary issues before us are whether the diversions projected by DOT are the result of applicants' market power and if so, are they significant. Market power can be defined as the ability to control prices or

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[2] DOT argues on brief due to maintenance of friendly connections at Kansas City, KCS will be able to compete for traffic originating north and west of Kansas City. As a result, shippers using KCS will generally not experience a reduction in the number of competitive routes available.

exclude competition. In light of the dual aspects of market power, we believe applicants' focus on the ability to charge monopolistic prices or raise prices *and* restrict output is too narrow. Applicants' ability to accomplish either of these aspects if an indication of market power and therefore appropriate for study. Within the context of excluding competition, it is our experience that major consolidations affect competitive and operating relationships among carriers. As a result, transit times, service reliability, solicitation practices and rate levels are often impacted which in turn result in traffic diversions. In our opinion diversions resulting from applicants ability to provide a competitive or superior service reflect perceived benefits of increased competition by the [704] shipping public. In contrast, diversions resulting from applicants' ability to exclude carriers from competing can be attributed to applicants' market power and may result in harm to the public. Situations most conducive to this latter activity include those in which: applicants provide a joint-line service with a nonincluded carrier prior to consolidation, are the only neutral or friendly connection of the nonincluded carrier prior to consolidation and provide single line service to destination or are able to route around the nonincluded carrier after consolidation. By limiting its diversions to situations in which nonincluded carriers lose their remaining neutral or friendly connections and hence their ability to compete, DOT has attempted to focus upon diversions attributable to appellants' market power.

The significance of these reductions in competition depends upon the level of competition remaining and the level of decrease projected. Applicants argue that intense competition will exist after consolidation. If this were the case, we agree that the public would be adequately protected from monopolistic abuse despite the loss of several joint line routings. However, we are not sure intense competition would remain for all traffic studied.

Considerable evidence regarding intermodal competition has been submitted in this proceeding. As more fully discussed in Appendix E-1, we are persuaded that motor carriers are not always an adequate substitute for rail carriers, particularly for certain long haul movements. In light of the distances involved in the territories studied by DOT, we question whether motor carriers will be intensely competitive. Simlarly, [sic] the lack of waterways through much of the territories greatly restricts water carriers' ability to provide a competitive alternative. As to intramodal competition, we recognize that there are generally numerous rail routings available to carry traffic. It is our experience, however, that the majority of traffic moving between markets is carried over relatively few routes. As a result, potential loss of major routes, like those studied by DOT, is a matter of concern.

Regarding the level of decrease, the market power diversions identified by DOT comprise approximately 33 percent of ATSF's interchange with UP at Kansas City, 39 percent of KCS' interchange with UP, 73 percent of MKT's interchange with UP, 15 percent of ATSF's interchange with MP at Sweetwater and 28 percent of SP's interchange with UP at Ogden (assuming SP is not competitive for time sensitive traffic). There are certain factors, however, that DOT did not consider or assumed neutral that would limit the number of diversions that actually occur. In our opinion, DOT acknowledges this by identifying its results as traffic *potentially* subject to diversion. The evidence presented in this case indicates that shippers do not always route their traffic by the most efficient route, nor always by a carrier's longhaul nor always by a competitive route. Among the reasons for these routings are equipment ownership, relationships with particular carriers, routing policies and special services. We do not believe the consolidation will prevent foreign equipment from moving into UP's service area nor will it affect all shipper/carrier relationships.

Accordingly, we believe that a certain although unquantifiable amount of traffic will continue to be routed over the study roads on a joint-line basis with UP despite the availability of applicants' single system routing.

On the other hand, we accept DOT's contention that certain of its assumptions understate its estimates of diversion and reductions in competition. Among these are (1) comparable transit times by friendly or neutral connections, (2) short hauling would not be considered in certain instances and (3) traffic not handled by study roads but for which they can effectively compete would not be considered. In our opinion, these assumptions allow different connections to provide a competitive alternative to the UP when in fact they may not be able to do so, ignore applicants' ability to influence service at the present gateway in order to receive a longer haul to a new gateway and ignore the potential competition study roads now provide but may not be able to provide after consolidation. In light of [705] these factors we believe there are additional, although unquantified, movements applicants could divert and that there are certain other movements, again unquantified, not considered in DOT's study for which applicants will be able to reduce competitive alternatives.

As to KCS's arguments, we do not believe its market power factors or a study of nonapplicant interline traffic susceptible to diversion measure applicants' ability to prevent KCS or other carriers from competing. What KCS has failed to show is that it will not have alternate connections to provide competitive service. Accordingly, we are not persuaded that DOT's study is understated on these grounds. Regarding KCS's argument that adidtional diversions would have been identified had other gateways been studied, we note that many of the markets in which KCS argues it would lose traffic lie exclusively in MP's service territory and that KCS is presently handling this traffic on a joint-line basis with

carriers other than MP. As such, we believe KCS's ability to provide service to these markets is not affected by the consolidation and that any diversions occuring would not be due to applicants' market power. We believe, however, that the concept of KCS's argument has merit. In light of the substantial interchange between UP and the former Frisco at Kansas City (87,000 carloads), we believe it reasonable to expect some of these cars to be diverted due to applicants' market power.

In balancing those factors which tend to overstate DOT's estimate with those that understate it, the exclusion of apparent sizeable quanties of UP-nonstudy road traffic and traffic for which UP-study road routings compete persuades us that DOT's study probably understates overall reductions in competition. As such we accept DOT's estimates as the lower-bound of diversion attributable to applicants incentive and ability to favor their routes.

STUDY REGIONS — 2% WAYBILL SAMPLE

[707] APPENDIX F

Analyses of traffic diversion studies

GENERAL BACKGROUND

Traffic diversion studies have been prepared to: estimate gains and/or losses of traffic as a result of the merger and trackage rights; provide a basis on which to estimate the changes in railroad operations resulting from changed traffic flows; provide a basis on which to estimate the added or avoided costs resulting from the changed traffic flows; and assess the environmental impacts resulting from the consolidation.

The required methodology is designed to achieve a high degree of uniformity and comparability among the many traffic studies produced by adversary parties. The purpose of the traffic diversion studies is not to establish damages to affected railroads; this is much too narrow a viewpoint. Instead, traffic diversion studies have as their purpose the quantitative measurement of the expected general, short-term changes in the relative competitive strength of a merged rail system in relation to competing carriers. These estimated changes are then considered as factors to be weighted in determining whether or not a proposed transaction is in the public interest. We emphasize that traffic diversion studies result in estimates. While the traffic sample is drawn on an objective basis, the evaluations of divertibility of sample units are strictly judgmental, based on facts surrounding the sample unit.

We will only examine the traffic diversion estimates which are in contention. In those instances where one traffic witness has made a traffic diversion evaluation that is clearly more reliable than a similar evaluation made by an opposing party, we accept the more reliable judgment and adjust the total estimated amount of diversion accordingly. In this manner, a finding is made of the esti-

mated dollar amount of potential gross revenue diversions. The final figure, however, remains an estimate based on the expert opinions of the carriers' traffic evaluators. It is an estimate only of the impact on traffic flows resulting from the merger and from no other factors. Thus, the final diversion figure must be viewed as a short-term impact reflecting changes in competitive relationships resulting from the newly unified operations.

The full impact of the UP-MP-WP consolidation will not occur until the third year following consummation, according to applicants' predictions. While the full impact would be reached in the third year, some of the competitive impacts would continue through ensuing years. However, the traffic diversion estimates must be viewed as short-term projections since so many economic and operational changes take place annually in the rail industry that the competitive impacts of a specific rail unification in time become blurred, if not totally unidentifiable. These other economic and operational factors include: (1) other rail unifications; (2) upward and downward changes in national and regional economies; (3) changes in operations throughout the industry through utilization of new routes; (4) institution of run-through train schedules; (5) changes in specific rates or even rate levels; (6) increases (or decreases) in the intensity of competition from other modes of transportation; (7) abandonments; and (8) changes in the level of cooperation between two or more railroads competing with the newly unified railroad (in short, the retaliatory actions by the competitors).

The foregoing factors represent some of the reasons why traffic diversion estimates cannot be construed as damages or as economic factors to be cast in concrete. To conclude otherwise, we would be forced to consider the transportation industry as static, a viewpoint which, at best, would be myopic.

[708] Our findings of traffic diversion totals are simply reasonable estimates of overall short-term competitive impacts on specific carriers. Car-by-car and dollar-by-dollar precision is not necessary. Where opposing estimates are reasonably close, we have accepted the estimates as providing minimum and maximum figures delineating a practical range within which actual diversions will most likely occur based on all of the pertinent traffic evidence.

Our analysis embraces the traffic studies of the applicants and all protestant railroads,[1] as well as the studies submitted in opposition to the CNW settlement and pooling agreement. In addiiton, we have examined certain traffic studies that relate to pertinent trackage rights requests.

APPENDIX F-1

UP-MP-WP

Applicants conducted three separate rail diversion studies to estimate the changes in traffic and revenue of affected railroads that would result from: (1) the common control of UPRR and MPRR; (2) the common control of UPRR and WP; and (3) the common control of UPRR, MPRR and WP. The traffic diversion studies and resulting estimates were based on 1979 traffic data of the UPRR, MPRR and WP. For the purpose of these three studies, 1979 traffic was defined as traffic handled in linehaul service which moved under waybills issued during 1979. UPRR's traffic data base was its waybill file from January 1979 through March 1980. MPRR's traffic data base was its Traffic Statistical Record for January 1979 through March 1980, while WP's data base was its Profit Analysis System for the same time-frame. The three studies were conducted by the applicants in a coordinated

[1] CNW submitted a traffic study in opposition to the primary application. However, it is not necessary to review this study because during the evidentiary portion of the proceeding CNW reached an agreement with the applicants.

manner using the same basic procedure, including probability sampling and the same study assumptions.

Since the initial sampling effort was performed at the beginning of April 1980, the March 1980 files of the three railroads were not available for sampling. Therefore, the initial frame was prepared from the 1979 files and January and February 1980 files of the three carriers. A supplemental frame was developed from the March 1980 files when they became available. In order to develop the initial sampling frame, the applicants took the January 1979 through February 1980 files and deleted all records with waybill dates other than 1979. Subsequently, the three carriers performed the same operation on the March 1980 files.

Before the traffic samples were drawn for the three railroads, certain traffic was eliminated by computer from the 1979 data bases. Such eliminated traffic consisted of movements determined to be non-relevant to the studies, namely, U.S. Postal Service traffic moving under government contract; traffic which was local to the applicants, their wholly-owned subsidiaries and their captive short lines; and traffic determined to be geographically non-relevant. The geographically non-relevant traffic included all intrastate traffic except in the states where more than one applicant provided service (California, Colorado, Kansas, Missouri, Nebraska, Nevada and Utah). In addition, UPRR traffic moving within the Pacific Northwest and MPRR traffic moving between points east of the Mississippi River, within the Southwest Lines Territory and between Southwest Lines Territory and points east of the Mississippi River, were generally excluded from the study as geographically non-relevant before sampling. In each study, to ensure that the same category of traffic was not studied by more than one carrier, all traffic in which UPRR and its wholly-owned [709] subsidiaries participated was eliminated from the MPRR and WP files prior to drawing the sample.

All the above-mentioned traffic which was removed from the 1979 traffic file of each railroad was placed in separate files (the initial files of excluded records). From these files of excluded traffic, a three-tenths of one percent sample was selected. The final traffic evaluator reviewed the sample movements in the excluded traffic file for his railroad and found that not one of the sample items was relevant to the study; and, therefore, each sample record had been properly eliminated. This procedure provided an indication that the frames from which the study samples were to be drawn had been properly prepared.

Once the initial frame from which the study samples were to be selected had been developed for each railroad, the three frames were stratified into twelve separate geographic strata. The twelve strata were chosen because the traffic officers of the three railroads concluded that these strata were likely to exhibit different average revenue gains or losses for the three studies.

The traffic records were stratified by first identifying all traffic which fit the criteria for stratum ten (intrastate movements in California, Colorado, Kansas, Missouri, Nebraska, Nevada and Utah) and placing those records in the tenth stratum. Then, records of traffic which moved to or from Colorado, Utah and Wyoming were placed in the eleventh stratum. The remaining traffic was stratified into the first nine strata. All traffic records which did not fit within the criteria chosen for the first eleven strata were placed into the twelfth stratum. Within each of the twelve strata, the records were first sorted by commodity code number and then by waybill data to induce substratification. From the three stratified sampling frames, standard computer programs were used to extract the initial 2 percent samples of the traffic records. When the March 1980 traffic records became available, a supplemental sample of 1979-dated waybill records was selected by each of the three carriers fol-

lowing the same procedures used in the prior sample selection.

UPRR prepared a printout listing 23,564 study movements from the initial sample and 49 movements from the supplemental sample. This printout was reviewed by UPRR's final evaluator who identified 6,659 additional movements within the sample records which could not possibly be diverted. These nondivertible movements included shipments which were local to the applicants: unit train coal shipments where any possible system route would result in a considerably lengthier route and shipments which could not be routed in any manner that would increase the length of haul on the system or improve system revenue.

MPRR prepared a printout showing 11,939 sample records from its initial sample and 39 records from its supplemental sample for manual identification and elimination of additional irrelevant sample shipments. This manual process was supervised and reviewed by MPRR's final evaluator and resulted in the identification of 8,831 shipments which could not possibly be diverted. WP also prepared a listing of 2,697 sample items from its initial sample and 14 items from its supplemental sample. The WP listing was reviewed by its final evaluator who identified 311 additional movements within the sample items which were irrelevant to the studies for geographic reasons.

A number of basic assumptions were made for use in all three studies by the traffic evaluators in deciding whether and to what extent traffic would be diverted. These assumptions were developed in consultation with operating, planning and traffic officers of the three railroads and were agreed to by the final traffic evaluators of the three carriers. One of the more important assumptions employed was that the environment of the railroad industry was the same as it was during calendar year

1979 except for the direct effects of the consolidation being studied. Thus, the effects of the BN-Frisco merger and SSW's purchase of Rock Island's Tucumcari line were not considered in these studies. An- [710] other important assumption used was that the consolidated system as well as other carriers would maintain and keep open all routes, rates, transit arrangements and channels of trade via junctions and gateways as they existed during 1979. In line with the assumption of 1979 conditions, traffic was not considered to be susceptible to diversion by the applicants if competitive rates did not exist over a potential route and the establishment of such a route would require the concurrence of competitive connection carriers. The studies did not assume that system cars would be available to substitute for equipment which actually was used in a sample movement.

Each railroad prepared Study Movement Sheets (SMS) for the relevant movements which had not been eliminated from their respective samples. These SMS contained all the information required by our order on applicants' petition for waiver served August 25, 1980, except for the expanded revenue. The three carriers made their best efforts to obtain all the data for each SMS. UPRR had 27 relevant movements and MPRR had one for which a copy of the waybill was not available. However, there was enough information available for each of these movements to determine their potential divertibility. WP had 4 movements for which the waybill copy was not available and a diversion judgment could not be made.

The three railroads brought the district and regional traffic sales officers from throughout the country to their respective headquarters to act as initial evaluators of the sample movements. The knowledge which these sales officers had of the many local and shipper-specific factors that go into the routing of traffic helped to enhance the quality of the studies. All of the evaluators received a standard set of instructions describing the consolidations

and the assumptions under which the studies were being conducted. An explanation of the SMS and the process to be followed by the evaluators in studying the sample movements were also given in these instructions. The evaluators were told to apply the specific percentage of either one hundred percent or zero percent to represent the amount of diversion anticipated on a sample movement.

The evaluators of UPRR were involved in all three studies, while the evaluators of MPRR and WP were involved only in the studies which pertained to the consolidation of their respective railroads with UPRR or the three carrier consolidation. Certain rules were established by the three carriers for each of the studies to determine which railroad would study joint traffic. These rules were used to eliminate overlap: (1) for the UPRR-MPRR study, traffic which moved over both UPRR and MPRR was studied by UPRR; (2) for the UPRR-WP study, traffic which moved over both UPRR and WP was studied by UPRR; and (3) for the UPRR-MPRR-WP, study, UPRR studied all traffic in which it participated. Traffic which moved over MPRR and WP (but not UPRR) was studied by MPRR when MPRR originated the traffic or when the traffic moved over WP as overhead traffic. Traffic which moved over MPRR and WP (but not UPRR) was studied by WP when WP originated the traffic or when the traffic moved over MPRR as overhead traffic and terminated on the WP.

The three railroads conducted each study separately to ensure that the evaluators were dealing with only one scenario at a time. After the initial evaluations were completed, the final evaluators of each railroad made the final diversion judgments on their respective SMS. The following table indicates the total number of SMS (movements) that were reviewed by the evaluators and the number which were identified as being divertible for each of the three studies.

[711]

Applicants Traffic Evaluation Studies 1

Carrier	Number of SMS	UPRR/WP Study	Number of Divertible SMS	
			UPRR/MPRR Study	UPRR/MPRR/WP Study
UPRR	16,954	674	3,020	3,512
MPRR	3,147		815	694
WP	2,400	755		765
Total	22,501	1,429	3,835	4,971

1 During the course of the proceeding, applicants changed the final evaluation on approximately 75 SMS's.

After the divertible movements had been identified in each study, the division officers of the three railroads calculated the revenue that accrued to each affected line-haul carrier under present routes as well as under new routes. The revenue information was then projected to apply to all traffic included in the frames. This produced expanded annual gross revenue gains for the applicants of approximately $50.7 million for the UPRR/WP consolidation, $105.6 million for the UPRR/MP consolidation, and $159.2 million for the three-carrier consolidation. In measuring the traffic benefits, the applicants assumed that only 70 percent of the traffic gains would be realized in the first year, 90 percent in the second year, and 100 percent in the third year.

The applicants developed the cost of handling the gained traffic for each traffic diversion study by using a modified 1979 application of Rail Form A Cost Formula. These costs were developed by costing the individual movements judged to be divertible in each study both as they were transported and handled in 1979, and as they would be handled after the consolidations. Based upon the cost studies, the applicants projected additional costs of approximately $40.3 million, $80.6 million and $125.7 million for the UPRR/WP, UPRR/MPRR and UPRR/

MPRR/WP consolidations, respectively. The estimated gains to the applicants in gross revenues and net revenues under the three types of consolidations are shown in the following table.

Applicants' Projected Gross and Net Revenue Changes
(Thousands of Dollars)

	Gross Revenue Changes			Net Revenue Changes		
Applicant	UP-WP	UP-MP	UP-MP-WP	UP-WP	UP-MP	UP-MP-WP
UP 1	$30,935	$ 46,864	$ 71,357	$ 9,943	$13,858	$20,785
MP	———	58,749	62,625	———	11,197	11,083
WP 2	19,782	———	25,233	491	———	1,637
Total	$50,717	$105,613	$159,215	$10,434	25,055	$33,505

1 Includes Spokane International Railroad.

2 Includes Sacramento Northern Railway and Tidewater Southern Railway.

The gross revenue changes for protestant railroads, as estimated by applicants, are listed in the table below:

[712]

Applicants estimates of revenue changes for protestants railroads
(Thousands of dollars)

Railroad	*Gross Revenue Change UP-MP-WP*
ATSF	$(13,951)
BN-Frisco	(42,608)
CNW	(8,396)
Conrail	4,239
DRGW	(29,846)
ICG	(9,398)
KCS	(3,152)
Milwaukee	(1,075)
MKT	(14,307)
SP-SSW	(32,217)

( ) = Decrease

Several protestants criticized the applicants' UP-MP-WP rail traffic study [2] and argue that the study has many conservative assumptions, flaws and deficiencies. Many

[2] This discussion applies to all three rail traffic studies.

of these protestants contend that the revenue losses derived from this study are understated. ATSF goes one step further and alleges that the applicants' study is so tainted that it cannot be used as a measure of the minimum losses which ATSF will sustain. Some of these criticisms and deficiencies are as follows: (1) the study was limited to only traffic contained in applicants' data bases, (2) an unrealistic zero or 100 percent approach to divertibility was utilized in the diversion judgments, (3) very conservative service assumptions were utilized, (4) applicants' equipment utilization efficiencies and the substitution of equipment were not considered, (5) post-Staggers Act single-line pricing advantage was not considered, (6) it was assumed that all routes, rates, transit provisions and channels of trade would remain open after the consolidation, (7) applicants assumed a static rail network, except for the implementation of their proposed consolidation, (8) there were conflicts between the diversion evaluations of the applicants and the forecasts contained in their special study of new marketing opportunities, (9) the changes made by the final evaluators from 100 percent diversion to no diversion created a substantial bias in the study, and (10) applicants exercise of market power in offering single-system rates or joint rates with terminating carriers while denying joint rates to competitors was not considered.

Much of the above criticism was considered in prior decisions, and we followed those policies in evaluating the studies here (*e.g.*, limitation of applicants' data bases, equipment substitution, etc., *BN-Frisco, SP-Tucumcari*). As for applicants' zero or 100 percent diversion approach, we have found that this diversion percentage approach, as well as an intermediate diversion percentage approach (*i.e.*, 10, 25, 50, 75) are proper provided the traffic evaluators use the selected percentage approach on the entire sample of relevant movements. Protestants' criticism that the applicants should have considered post-Staggers Act pricing advantages has little merit. These parties will be

able to rely on the same Staggers Act ratemaking features available to the applicants and may gain traffic from the new consolidated system or retain traffic that might otherwise be diverted to the applicants. We do not believe that the pricing features in the Staggers Act significantly affect any party's estimate of diversion in this proceeding.

We tend to agree with the protestants that the applicants rail traffic study included certain shortcomings and limitations. The traffic diversion estimates assumed a post-merger [713] status quo situation in terms of maintaining and keeping open all routes, rates, transit arrangements and channels of trade via junctions and gateways as they existed during 1979. This approach lends itself to conservative estimates because there may be certain competing routes in which the applicants now participate which may be cancelled in the future in order for the applicants to acquire additional traffic over a new longer system route. Another factor attesting to the conservative nature of the results of the study is that the applicants were not able (nor can we reasonably require them) to study the traffic moving on other railroads that is not currently handled by UP, MP, WP or one of their subsidiaries. These data are not available to a prospective applicant prior to the filing of an application. The applicants will in all probability be able to solicit some of this non-joint traffic away from other carriers and thus increase their own revenues.

One offsetting factor which tends to slightly overstate the revenue estimates is the fact that the effects of the *BN-Frisco* merger and the SSW's purchase of Rock Island's Tucumcari line were not considered in the study. These two transactions may tend to insulate those carriers from some of the reroutings which applicants here identified in their traffic diversion study. Despite these shortcomings and limitations, the applicants' rail traffic study appears to be well conceived and executed. Under

these circumstances, it is concluded that the revenue changes projected by the study represent a sound indication of *minimum* changes in revenue which would be experienced by the protestant railroad.

Applicants' Non-Rail Traffic Study

The applicants also conducted a non-rail traffic study in order to develop a realistic projection of the level of traffic diversion from motor carriers that would result from the same three proposed control transactions which were considered in the rail traffic diversion studies. The study was designed to be compatible with the rail traffic studies so that the results of both studies could be used together as input to the operating plan, environmental impact statement and energy statement. While the study was designed to quantify intermodal diversion opportunities, it was also designed to identify in a qualitative manner potential traffic which the new system could pursue. The study was conducted as a limited market survey. The shippers surveyed were not selected through the use of statistical sampling techniques but from specific corridors where significant amounts of motor carrier traffic were known to exist. Specifically, traffic which moved between and through Memphis, St. Louis and Chicago, on the one hand, and Seattle, Portland, Oakland-San Francisco and Los Angeles, on the other hand, was studied. The study also looked at traffic moving to or from Kansas City, Denver, Salt Lake City, Reno and Sacramento. Approximately 600 firms that use motor carrier service in these corridors were surveyed.

These firms were selected by the three railroads based on their internal information on shippers of transcontinental motor carrier traffic. A survey questionnaire was designed by a study team composed of UPRR, MPRR and WP representatives in order to (1) develop a factual record of the shipper's truck movements in 1979; (2) determine the service requirements of the shipper; and (3)

determine the amount of traffic which the shipper would divert to the new system if its service requirements were met. A consistent set of instructions was developed for the interviewers to assure uniformity of the data collected on the questionnaire.

The questionnaire and instructions were forwarded to the appropriate sales territory where shippers had been selected for the survey. Each shipper was informed by the interviewer that the interview was being conducted for an intermodal diversion study and would be submitted as part of an application to the I.C.C. for approval of the proposed consolidation. The shipper was also advised that this study would be used by the new system to develop service packages that would meet the needs of motor carrier users. After the ques- [714] tionnaires were completed by the sales forces, they were forwarded to the study team for diversion judgments.

A number of basic assumptions were used to make the study's diversion judgments. Since the study was designed to be used as input to the operating plan, no changes were assumed from calendar year 1979 except those which resulted directly from the effects of the consolidation being studied. The study assumed that the service levels provided by the system's eastern and southern connecting carriers would not change as a result of these transactions. The transit time used by the study team on traffic between Chicago, St. Louis and Memphis gateways and eastern and southern origins or destinations were based on transit time experienced in 1979. The service assumptions used in this study were the same operating parameters which were used in the rail diversion study.

If the shipper indicated that it would not divert traffic to the new system, this judgment was accepted by the evaluators regardless of the systems' ability to meet the needs of that shipper. On the other hand, if a shipper indicated that traffic would be diverted, that traffic was

only listed as divertible if the system would be able to meet the needs of the shipper. Where there was a question as to whether the system could meet a shipper's service needs, the evaluators assumed that only a portion of that traffic would be divertible. If a shipper indicated that rate adjustments would be required before diversion to the system could occur, only 75 percent of the traffic opportunities identified by the surveyed firm were considered to be divertible by the evaluators. In certain instances, traffic which the shipper indicated was divertible was assumed to be nondivertible by the evaluators because of infeasible transit time, stop-off requirements, infeasible equipment requirements, single line hauls or insufficient information to confirm that the traffic was divertible.

A preliminary evaluation form and a set of instructions were developed by the study team to ensure that each group of initial evaluators used a uniform approach to evaluate the questionnaires. The initial evaluations were performed by study team members at each railroad where select information from the questionnaires was transferred to the preliminary evaluation form. After the initial evaluations were completed, the study team met and discussed the preliminary evaluations. The study team members reviewed each initial diversion judgment and made a recommendation to the final evaluator on the final diversion judgment. As the final judgments were made, the data on each movement was recorded on a movement information form which was later used in the compilation of mileages and tonnage data for the operating plan and environmental and energy impact reports. Once all evaluation forms were processed and a final judgment was made on each movement, an audit was performed to ensure that the final evaluator had reviewed all entries. Evaluation forms were then sorted by corridor and tabulations were made.

The results of the study showed that over 25 percent of the traffic studied was judged to be divertible to the

new system. The applicants estimate that more than 25,000 trailers of motor carrier traffic would be diverted annually to the new UPRR/MPRR/WP system's TOFC/COFC service. Additionally, it is anticipated that the equivalent of over 1,800 carloads would be diverted annually from motor carrier to applicants' rail carload service. The gross revenue and net revenue gains that would accrue to the applicants from motor carrier shipments under the three types of consolidations are shown in the following table.

[715]

Projected Increases In Gross and Net Revenues From Non-Rail Traffic
(Thousands of Dollars)

Carrier	Gross Revenue Changes			Net Revenue Changes		
	UP/WP	UP/MP	UP/MP/WP	UP/WP	UP/MP	UP/MP/WP
	Consolidations			Consolidations		
UP	$3,430	$16,740	$23,134	$1,047	$5,000	$7,113
MP	.....	3,582	4,596	.....	132	315
WP	2,697	.....	4,810	412	.....	425
Total	$6,127	$20,322	$32,540	$1,459	$5,132	$7,853

Some of the protestants and OSC argue that the applicants' estimate of revenue diversions from other modes cannot be relied upon because it is based on a flawed study. ATSF contends that the non-rail study of the applicants utilized an erroneous study approach, applied unrealistic study assumptions, and failed to consider many of the factors which would influence how existing motor carrier traffic would be rerouted. ATSF believes that some portion of the traffic reported as under consideration for diversion, for many reasons, actually will not be diverted to the new consolidated system. The protestant also contends that because the applicants did not know what the rate levels might be, no motor carrier traffic should be assumed to be potentially divertible to the new system as a result of any TOFC rate reductions. In addition, ATSF asserts that the following assumption

made by applicants was illogical. Applicants assumed that the rate and service factors necessary to shippers before they would consider diverting traffic to the new system were not already offered by some other railroad or railroads. The protestant points out that ATSF and SP are currently offering motor carrier competitive single-line and joint-line TOFC rates and service between points in California and Chicago, St. Louis, Memphis and Kansas City. Finally, ATSF claims that applicants' assumptions that service improvements will attract traffic to its new rail system is without merit because applicants are offering little or no improvements in existing rail service in any intermodal corridor in the west.

MKT faults the non-rail study because (1) the shippers selected for interview were those with whom the applicants had prior dealings and in almost all cases were routing traffic over those systems, (2) the survey was conducted by applicants' salesmen, (3) no specific questions were given to the interviewers, and (4) the salesmen and the shippers interviewed were informed of the purpose of the survey. OSC criticizes the non-rail diversion study because it was based on a survey in which applicants' marketing representatives sought to determine whether shippers using trucks would merely consider switching to rail after the proposed consolidation. OSC argues that applicants may not be able to achieve the rates and service levels shippers indicated that they would need in order to achieve the diversion. In addition, OSC asserts that the Motor Carrier Act of 1980 which relaxed trucking regulation may require further rail rate adjustments in order to divert motor carrier traffic. Furthermore, OSC contends that applicants have not shown that their use of resources—capital and labor cost—would be any less than those of trucks. Finally, OSC argues that there are several independent railroads offering interline TOFC service directly competitive with trucks.

The evidence in the record belies ATSF's assertion that applicants are offering little or no improvement in existing rail service in any intermodal corridor in the west. For exam- [716] ple, in the Los Angeles to St. Louis corridor, the new consolidated system's eastbound service will be 17½ hours faster than the present UP-MP joint-line service and 8 hours faster than any other single-system service. For westbound traffic in that corridor, the proposed system will be faster than any other single-system service. In addition, the applicants will provide the only truck competitive single-line or single-system TOFC service between Seattle and St. Louis. The evidence shows that almost 29 percent of the non-rail diversions would come from these two corridors. It is interesting to note that ATSF argues that the applicants new service will be sufficient to enable it to divert a significant amount of TOFC traffic from ATSF but the proposed consolidated system will not offer good enough service to attract motor carrier traffic. As a single-system, the applicants will possess several marketing capabilities that independent railroads operating jointly do not have. A major problem in the development of attractive TOFC service has been the number of independent railroads with which a shipper is forced to deal, compared to single-line motor carriers. Single-system service would alleviate this problem, and significantly simplify negotiations with shippers concerning specific TOFC service. In addition, the new consolidated system will be able to utilize new marketing techniques, including new dedicated services, that will enable the applicants to attract more TOFC traffic.

OSC's assertion that the Motor Carrier Act of 1980 may require further rail rate adjustments in order to divert motor carrier traffic ignores the neutralizing effect that our 1981 exemption of rail TOFC operations from regulation will have. As for the protestants' criticisms of the methodology and evaluation criteria employed in

the non-rail study, we find the applicants' approach to be reasonable. It must be kept in mind that the results of the study are only estimates.

The evidence indicates that the applicants will use innovative rated approaches, such as two-way hauls, contract rates and Plan V agreements in order to divert truck traffic. In addition, the new consolidated system should be able to provide more reliable and consistent service, thus enhancing the opportunity to divert motor carrier traffic. The study, which was a limited survey, revealed that some 493,659 tons of motor carrier traffic from 600 shippers may be divertible to rail service on the new system. Not all the shippers surveyed disclosed their total volume of truck traffic but the applicants estimated from those that did that these 600 shippers account for about 2.5 million tons of truck traffic annually. In their economic analysis, applicants cited data showing truck traffic volume in excess of 7.0 million tons in certain of the study corridors. This is almost three times the volume of shipments covered in the non-rail traffic study. Thus, it appears that the potential exists for even greater diversion from motor carriers than was estimated in the non-rail study of the applicants. However, it has been our experience that shippers' affirmative responses do not necessarily equate to the handling of traffic. Shippers are always interested in exploring lower rates and more reliable service, and in maintaining strong competitive positions between modes. In this respect, we believe that applicants' estimate of traffic gains may be optimistic. On balance however, we suspect that the total actual diversionary effect may be understated.

APPENDIX F-2

ATSF

To determine traffic and revenue changes resulting from the UP-MP-WP consolidation and the cumulative

impacts resulting from the proposed consolidation, the BN-Frisco merger and SSW's purchase of Rock Island's Tucumcari line, ATFS studied a sample of its 1979 traffic. The 1,757,501 carload movements contained in ATSF's 1979 freight traffic [717] data base served as the frame for the sample and each individual carload was considered a sampling unit. Based on results of a pilot study of its 1979 traffic, ATSF randomly selected 15,500 carload movements for study.

The sampled movements were computer sorted into four categories: (1) general traffic, (2) coal traffic, (3) United Parcel Service traffic where United Parcel Service was both consignor and consignee and (4) traffic moving between selected state-to-state pairs. Coal, United Parcel Service and traffic moving between the state pairs were determined generally to be unaffected by the three transactions due to long term unit train service considerations, extraordinary ATSF-shipper relationships and geographic noninvolvement, respectively. General traffic was visually screened to identify movements not likely to be affected by any of the three transactions. As a result of these screenings, an initial principal focus study group of 6,231 movements was defined. Study movement sheets were prepared for each of these movements and distributed to ATSF origin and destination sales offices for shipper information and to ATSF's Accounting Department for settled revenue data and each movement's waybill. Movements screened out as not likely affected were reviewed by ATSF's initial evaluators resulting in approximately 100 movements being added back into the principal study group. Detailed backup information for these movements was obtained.

Following completion of objective information, the study movement sheets were sorted according to (1) grain and grain mill products, (2) automotive traffic, (3) TOFC (domestic), (4) COFC (minibridge/land-

bridge) and (5) all other traffic. Written instructions and assumptions for making divertibility judgments were prepared and used by ATSF's initial and final evaluators. Major assumptions included: (1) conditions surrounding each study movement would be the same as in 1979 except for changes in service capabilities directly related to the proposed consolidation, BN-Frisco merger and SSW's purchase of the Tucumcari line, (2) service provided by ATSF and all other nonmerging systems would be the same as in 1979, (3) the newly merged system and all other carriers would maintain and keep open all routes, rates and transit privileges via junctions and gateways as they existed in 1979, (4) at locations where the newly merged system would have an improved ability to supply equipment, specific equipment ownership would not be considered, (5) BN-Frisco service would be what the Commission found in the BN-Frisco decision, supplemented by calculated service for corridors for which service estimates were not provided; SP service would be what the Commission found in its Tucumcari decision with modifications regarding connecting service schedules and allowing for a 4-6 hour faster service between Kansas City and St. Louis; UP service would be that proposed in its application with certain modifications, (6) TOFC/COFC shipments would be susceptible to diversion to or from other carriers with facilities within the pickup and delivery limits of the TOFC/COFC origin or destination and (7) movements under contracts can be diverted if the contracts would change in the new competitive environment. In addition, ATSF's final evaluator assumed, among others, that certain automotive movements involving Chrysler at Los Neitos, CA and Phoenix, AZ and Ford Motor Company at Milpitas, CA would be diverted 100 percent and that BN would have new through routes and service from Chicago, St. Louis and Kansas City to Houston and Galveston.

Divertibility judgments were made regarding each of the three transactions utilizing a uniform set of reasons for diversion and uniform diversion percentages of 0, 10, 25, 50, 75 and 100 percent. For movements judged wholly or partially divertible to one or more of the three new systems, new routes and junctions were recorded on the study movement sheets. Diverted movements were sent to ATSF's Division Department for assignment of revenue percentages applicable via the new route(s). Revenue changes were expanded and tabulated, resulting in ATSF gross revenue losses (1979 dollars) of $64,037,004 for [718] the UPRR-MPRR-WP consolidation, $28,253,954 for the BN-Frisco merger and $81,966,887 for SSW's purchase of the Tucumcari line. Precision achieved for the UPRR-MPRR-WP consolidation was a $2,747,016 (4.3%) standard error, for the BN-Frisco merger $1,567,152 (5.5%) standard error and for SSW-Tucumcari, a $3,264,547 (4.0%) standard error. During evidentiary hearings, ATSF changed its evaluation of several movements resulting in revised gross revenue losses of BN-Frisco—$28.294,320; SP-Tucumcari—$81,925,047; and UP/MP/WP—$64,177,037.

Applicants argue that ATSF's traffic study is entitled to little if any credence because (1) the time period in which it was performed was too short to allow for meaningful evaluations, (2) the evaluations were based on unreasonable schedule and service assumptions, errors and omissions and (3) the estimate of losses from previous transactions (BN-Frisco; SP-Tucumcari) exceeds the Commission findings in those cases by too large an amount to be reliable.

In response, ATSF argues that its evaluations are sound and well-reasoned, that applicants' criticisms are superficial and unsupported and that its cumulative impacts are supportable and consistent with Commission policy of studying such impacts.

We have analyzed ATSF's traffic study and observed those responsible for its preparation under cross examination. Based on our analysis, we believe ATSF performed a study of high quality capable of producing reliable results. While we agree that the time period in which evaluations were made was short, we recognize that such has been and no doubt will continue to be the case as procedural deadlines are set to meet our statutory time-limits. In light of these constraints, we believe it is incumbent upon parties to use experts in designing their studies and making diversion judgments. In our opinion, ATSF has utilized such people particularly in the evaluation phase of its study where it utilized an individual with 40 years experience in its traffic department, with broad knowledge of shippers, their needs and transportation services available and who was able to support diversion judgements for each of the movements presented to him in cross examination. In light of these personal qualifications and abilities, we believe the short time-span used did not affect the quality of ATSF's diversion judgments.

Applicants also fault ATSF's study for its use of various assumptions and for failure to consider various factors affecting route selection. In general, we believe the assumptions used by ATSF were reasonable and that the movement factors considered were reasonably complete. Our experience has shown that routings are often the result of a number of different factors which vary according to particular consignor/consignees. As such we believe the most appropriate place to consider applicants' arguments is in the evaluation of specific movements. We have done so and our findings are included in the discussion which follows.

As to ATSF's cumulative impacts, we agree with ATSF that higher rate levels and changes in its traffic mix would increase its diversion estimates from those made in BN-Frisco and SP-Tucumcari. We also agree

with ATSF that it has provided support for its cumulative judgments and that neither applicants, BN nor SP have rebutted them. Nevertheless, the losses estimated by ATSF are considerably higher than either ATSF's estimate or our findings in the two previous proceedings ($8.1 versus $28.3 million in BN-Frisco, $33.3 versus $81.9 million in SP-Tucumcari). While this in itself is not reason to dismiss ATSF's estimates, we note that SP vigorously contested ATSF's study in Tucumcari and persuaded us that ATSF's results were overstated. As to the lack of opposition against ATSF's estimates, we believe there is no incentive for SP or BN whose transactions are consummated and who are fellow protestants with ATSF to rebutt ATSF's estimates here. Similarly we believe it would be difficult for applicants to effectively rebutt diversions from ATSF's traffic base to carriers other than themselves. In light of the great differences [719] between ATSF's estimates in this case of its losses due to the Tucumcari and BN-Frisco consolidations and our prior findings, and our prior finding that ATSF's losses to SP in Tucumcari were overstated, we are hesitant to accept ATSF's present estimates. As such we will rely on our previous findings in evaluating the cumulative impact against ATSF.

Automotive Traffic

Applicants identified 18 shipments of automobiles or auto parts which they contend will not be diverted for service, circuity, equipment and/or shipper routing policy reasons. Twelve of these consist of shipments to or from Ford Motor Company at Milpitas, CA; four from Chrysler Leasing in Los Angeles; one from TNT in Oakland and one from Myers & Sons in Las Vegas. Principal reasons for ATSF's diversions include: applicants' single system service, applicants competitive service, fewer carriers in the route, applicants' faster or more direct service and/or consignor/consignee location. On cross examination, ATSF agrees that the Myers & Sons shipment

will not be diverted (TR 2726,7). As to the others, we believe applicants' competitive service, elimination of interchanges and/or direct service to the consignor/consignee will likely result in diversion of this traffic. Expanded revenues of $30,954 will be deducted from ATSF's estimated loss.

Grain

Applicants identified 11 movements of wheat, sorghum grain or corn which they contend will not be diverted for service, routing influence and/or equipment reasons. Of these 11, seven consist of transit moves from Kansas City, Topeka or Hutchison on the one hand to Houston, Galveston or Mexican points on the other. For each, UP originated all or a part of the inbound tonnage which in our opinion should enable it to influence this traffic to MP routings. The remaining four consist of movements from Council Bluffs, IA to Lockney, TX routed UP-ATSF; Topeka to Sweetwater, TX routed ATSF; Topeka to Laredo for export to Mexico routed ATSF-Ft. Worth-MP, and Topeka to Culpeper, VA routed ATSF-Kansas City-MP-E. St. Louis-SOU. In regard to the three Topeka moves, each originated at a UP point open to MP and ATSF and each moved in a free-running ATSF covered hopper car. By virtue of reciprocal switching available to MP, MP could have handled these movements in single line service to destination in the first instance and to the Laredo and E. St. Louis gateways in the other two. In light of this ability, we believe ATSF's participation was due in part to use of its special equipment. We believe ATSF will be able to supply equipment for this traffic in the future and thereby will retain this traffic. Expanded revenues of $151,938 will be deducted from ATSF's estimated loss.

TOFC/COFC

Applicants dispute ATSF's diversion of 348 TOFC and 149 COFC shipments primarily for service and rout-

ing influence reasons. The majority of the disputed TOFC traffic consists of freight forwarder, shipper association and shipper agent traffic moving transcontinentally to or from Los Angeles or the Bay Area. COFC traffic in dispute consists mainly of landbridge/minibridge shipments moving between middle Atlantic or northeast ports on the one hand and southern California or central California ports on the other.

TOFC traffic is generally time-sensitive and routed over routes providing fast and reliable service. Other factors influencing the routing of this traffic includes freight house location and ownership, ramp location and train cut-off and arrival time. COFC traffic likewise is generally time sensitive but not to the degree required by forwarder type traffic. We have reviewed applicants' and ATSF's schedule and service assumptions and believe them to be reasonable estimates. Based on these estimates, we believe applicants' single line or joint line service in connection with CNW will be competitive with ATSF's service between Chicago and the Bay Area; Kansas City and the Bay Area; Chicago and Los Angeles; St. Louis and Los Angeles; St. Louis to the Bay Area and Los Angeles to Memphis. We have also [720] reviewed applicants' and protestants' traffic samples and find that many TOFC/COFC shippers use multiple routings within single corridors. In light of applicants' ability to provide competitive service and shipper use of multiple routings, we believe applicants will be able to divert a portion of ATSF's TOFC/COFC traffic.

There are a number of shipments, however, which we believe will not be diverted due to unique factors or noncompetitive schedules. Among these are three shipments from Nuway Shippers in Chicago to San Francisco routed ATSF. On cross examination ATSF testified that the routing policy of Nuway Shippers is to use ATSF whenever it provides reasonably competitive service (TR

2816). While ATSF will lose a portion of its Chicago-Bay Area traffic to applicants we fully expect it to continue providing competitive service in this market. As such we believe ATSF will retain this traffic.

Two additional shipments consist of movements from Consolidated Service in Mattoon, IL to Los Angeles and from National Piggyback in Carbondale, IL to Los Angeles. Both were routed via ICG's longhaul to Memphis and thence SLSF-Avard-ATSF. ATSF rerouted each to ICG-St. Louis-UP due to, among other factors, applicants' new competitive service. Our review of the Official Guide and Intermodal Equipment Register shows that ICG is the only carrier with TOFC loading facilities in Mattoon, Carbondale or the surrounding area. Due to the investment ICG and ICG alone has made to provide shippers in this area convenient TOFC service, we believe it is unlikely that these shippers would shorthaul ICG to St. Louis on future movements. Accordingly, we believe ATSF will retain this traffic.

There are a number of movements which we believe will be diverted but at a lower percentage than that predicted by ATSF. Six such moves consist of two shipments from Merchant Shippers at Chicago to San Jose routed ATSF-Stockton-WP and four shipments from Clipper Express in Chicago to San Jose routed the same way. ATSF rerouted each to CNW-Fremont-UP 100% of the time. In reviewing other ATSF diversions, ATSF diverted a similar Clipper Express shipment 75% of the time and a Merchant Shipper shipment from Chicago to Sacramento routed ATSF-Stockton-WP 75% of the time. We believe that applicants' run through service with CNW together with elimination of the ATSF-WP interchange will give applicants a service advantage on these shipments. Nevertheless, ATSF's present participation in the traffic, its good relationship with Clipper and Merchant, location of Clipper facilities on ATSF in Chicago and

diversion of similar moves at the 75% level lead us to believe ATSF will not lose all of this traffic in the future. In our opinion a loss of 75% would be reasonable.

Four additional shipments consist of movements from Joseph Schlitz at Los Angeles to Schlitz at Memphis routed ATSF-Amarillo-RI. ATSF rerouted each to UP direct 100% of the time. With the liquidation of the RI new routings will be needed. In evaluating alternatives available, ATSF routings in connection with BN would in our opinion provide competitive service with applicants' single system service to Memphis. ATSF's competitive service and existing influence which enabled it to participate in the present routings should prevent a complete loss of this traffic in the future. In our opinion a loss of 50% would be reasonable.

Another movement consists of a shipment from Crown, Cork & Sea at Richmond, CA to Greybull, WY routed ATSF-Denver-BN. ATSF rerouted the movement via UP-BN 100% of the time due to applicants' faster or more direct service. Our review of mileages shows the ATSF routing to Denver to be approximately 1,715 miles. In comparison, SP-UP mileages total approximately 1,370 miles, SP-DRGW—1,390 miles and WP-UP—1,540 miles. In light of ATSF's ability to participate in this move despite the availability of more direct routings, we believe ATSF would not lose all future traffic, especially to applicants' [721] route which ranks third in circuity out of the four routes mentioned above. In our opinion, a loss of 50% would be reasonable.

Another movement consists of a shipment from Guild Wineries at Guild, CA to Rockford, IL routed CCT-Stockton-ATSF-Kansas City-BN. ATSF diverted the shipment 100% of the time to CCT-Stockton-UP-Council Bluffs-ICG for service reasons. On brief, ATSF states applicants could handle this move alternatively via Kansas City. The record shows that UP service would be only a

few hours faster than ATSF's. In our opinion, a few hours difference for this shipment is not of such magnitude to render ATSF noncompetitive. Accordingly, we will accept a loss of 50%.

There are a number of movements which we believe will not be diverted because applicants' proposed service would place them at a competitive disadvantage. Among these are 37 movements from or through Memphis on the one hand to Los Angeles or the Bay Area on the other. Schedule assumptions show BN-ATSF service to be nearly 20 hours faster than applicants' single system service in both markets. While such differentials may be acceptable for so-called "dead day" traffic, use of ATSF routings indicates to us a desire to use a fast, reliable service. In light of this preference, we believe applicants would face difficulties in attracting this traffic.

There are four shipments which we believe will not be diverted due to the circuity involved in the reroute. Two of these consist of movements from ITOFCA and National Piggyback in Dallas to the Bay Area routed ATSF. ATSF rerouted each to applicants' single system due to their ability to provide competitive service. The record shows that routing via applicants' lines involves nearly 800 additional miles. Present use of ATSF indicates to us a desire to use a fast, reliable service. In our opinion, the time required to traverse an additional 800 miles would most likely render these reroutings unacceptable to these shippers.

The other two shipments consist of movements from Joseph Schlitz in Los Angeles to Schlitz in Longview, TX routed ATSF-Dallas-MP. ATSF rerouted the shipments to UP direct due to applicants' ability to provide competitive single system service and consignee location. Our review of mileages shows that applicants' single system is approximately 900 miles longer than the present route. While elimination of an interchange at Dallas would off-

set some of the additional time required to travel the longer route, we do not believe the offset would be total. This coupled with ATSF's receipt of its longest haul consistent with service should be sufficient to prevent loss of this traffic.

The final movement consists of a shipment from Savannah, GA to Oakland, CA with a stopoff in Los Angeles. ATSF conceded on cross examination that this move will not be diverted (TR 2881). Expanded revenues for the 59 movements discussed above, $3,417,971, will be deducted from ATSF's revenue loss.

Equipment

Applicants identified 45 shipments which they contend will not be diverted due to among other factors the equipment used. Eleven of these—8 grain and 3 TOFC shipments—have already been discussed. Of the remaining 34, we agree with applicants in regard to 31. Of these, 30 moved in ATSF equipment and 1 moved in BN equipment. Additionally, 24 of the 31 were switched at origin by carriers other than applicants and three more had joint switching available through applicants and either ATSF or SP. ATSF diverted each to applicants' system primarily because of applicants' ability to provide competitive service. Other factors influencing diversion were applicants' faster or more direct service, location of consignor/consignee, fewer carriers in the route and applicants' increased ability to supply equipment at certain points on their system. In evaluating the present routing of this traffic, we note that each of the shipments could have been routed via alternate competi- [722] tive routes or by routes with fewer carriers in them. As such, it is our opinion that ATSF's participation in this traffic is due in large part to use of its equipment. While we believe that applicants will have greater equipment availability along its system, we find no reason to conclude

that ATSF will not be able to continue supplying equipment for this traffic. Accordingly, we will deduct $3,253,509 from ATSF's revenue loss.

Other Carload

Applicants identified 201 additional shipments which they contend will not be diverted primarily for reasons of service, routing influence, circuity and/or industry location. Of these 11 moved in ATSF local service, 29 were originated and forwarded by ATSF, 100 were received and terminated by ATSF and 61 moved in ATSF overhead service.

Local

Of the 11 local movements in dispute, we agree with applicants in regard to three. Of these, two consist of shipments from Wichita, KS to Long Beach, CA and the third, from South Bay City, TX to South San Francisco. All three were diverted to applicants' single system. The record shows that each shipment moved in a privately-owned tank car, that MP provides reciprocal switching for ATSF in Wichita, that ATSF switches the consignor in Bay City and that MP's service to Wichita is branch line service. By our calculations, the diverted routes are approximately 700 miles longer (45% circuity) from Wichita and 800 miles longer (38% circuity) from Bay City than the present routes. In our experience shippers using private tank cars generally use routes providing fast turnaround times except during periods of car surpluses. The present routes are direct and expeditious, reflecting this general practice. In light of the present use of expeditious routes, ATSF direct switching at Bay City and applicants' branch line service to Wichita, we believe the additional time applicants' service would require renders diversion of these movements unlikely. Expanded revenues of $846,667 will be deducted from ATSF's estimated loss.

Interline Originated

Of the 29 forwarded movements in dispute, we agree with applicants in regard to five. Two of these consist of movements of petroleum coke from Collier, CA on the one hand to Baytown, TX and Federal, IL, on the other. Present routings consist of ATSF-Sweetwater-MP and ATSF-Kansas City-MP-E. St. Louis-ITC, respectively. ATSF diverted the first via ATSF-Stockton-UP and the second via ATSF-Stockton-UP-ITC, due to among other reasons applicants' competitive service and use of MP special equipment. The record shows that both movements originated at ATSF closed points. It has been our experience that originating carriers, especially carriers at closed points, are generally able to establish closer relationships with the shipper and exert greater influence over routings than non-serving carriers. In both instances, ATSF received a substantial haul indicating to us that such a relationship has developed. The proposed consolidation, which does not give applicants entry to the shipper will in our opinion not affect ATSF's relationship. Accordingly, we believe ATSF will retain its present long haul.

Two additional moves consist of shipments from McPherson, KS to Springfield, MO routed ATSF-Kansas City-SLSF and from McPherson to Norfolk, NE routed ATSF-Kansas City-CNW. ATSF diverted both to applicants' single system service. Study movement sheets for these shipments indicate that the consignors are the same for both moves, that both moved in MP plain box cars, that ATSF switches the origin and provides reciprocal switching to MP and UP, that MP serves the consignee at Springfield, and that UP serves the consignee at Norfolk. ATSF's ability to participate in this traffic on a joint line basis in lieu of MP and UP's respective single line alternative indicates to us that ATSF's direct switching and service give it the ability to influence these routings. Furthermore, with [723] applicants' service from

McPherson to continue as branch line service, we do not believe that the consolidation will improve their service to the degree needed to overcome ATSF's present influence. Accordingly, we believe ATSF will retain this traffic.

The final move consists of a movement from Los Angeles to McKeesport, PA routed ATSF-Chicago-NW-PLE. The study movement sheet shows that ATSF serves the origin and provides reciprocal switching to SP and UP and that the shipment moved in an ATSF unequipped gondola. For reasons already set forth in our discussion at ATSF equipment, we believe this movement would not be diverted. Expanded revenues for the five moves, $291,999, will be deducted from ATSF's estimated loss.

Interline Received

Of the 100 received movements we agree with applicants in regard to 12. Two of these consist of movement from Grand Island, NE to Presidio, TX routed UP-Kansas City-ATSF. ATSF diverted the shipments to UP-Ft. Worth-ATSG due to applicants' new competitive service, use of UP equipment and UP switching at origin. The record shows that the destination is served exclusively by ATSF and that no routes or divisions exist via the diverted route. In our opinion, it is unlikely that ATSF would concur to a new route which would short-haul itself. Accordingly, we believe these shipments will continue moving via their current route.

A third shipment consists of a movement from West Monroe, LA to Los Angeles Harbor routed ICG-Monroe-ALM-Bastrop-MP-Kansas City-UP-Denver-DRGW-Pueblo-ATSF. ATSF diverted the movement to ICG-Monroe-ALM-Bastrop-UP due to applicants' new competitive service and fewer carriers in the route. The shipment moved in a UP plain box car from a closed ICG origin point to a point open to ATSF, SP and UP. The existing route is a circuitous route involving six carriers. There are

numerous routings available including UP routings from Kansas City to Los Angeles that would involve fewer carriers and provide faster transit. As such we believe applicants' competitive and probably faster three-line service would have little influence over the future routing of this traffic. Accordingly we believe ATSF will retain this traffic.

A fourth shipment consists of a movement from Kendall Co. at Westover, GA to Kendall Co. at Merced, CA routed SOU-Memphis-MP-Kansas City-ATSF. ATSF diverted the shipment to SOU-Memphis-UP-Stockton-ATSF for reasons of equipment and applicants' new competitive service. The record shows that the shipment moved in a MP equipped box car to a closed ATSF point. The current routing in our opinion recognizes both MP's equipment ownership and ATSF's exclusive service at the destination. In light of ATSF's current long haul participation we believe it is unlikely that Kendall would short-haul its sole delivering carrier to favor an overhead carrier.

The final eight shipments consist of seven movements from Texas, Louisiana and Arkansas points on the one hand to central California points on the other and one movement from Arkansas to the Los Angeles area. Each involved MP-Sweetwater-ATSF routings and each involved movements of hazardous commodities or chemicals in private tank cars. ATSF diverted each to applicants' single system service, UP-Ogden-SP or UP-California Junctions-ATSF routings. It has been our experience that shippers using private tank cars generally select routes providing fast, reliable transit times except during periods of car surpluses. The routing currently used is an accepted service route reflecting this general practice. The reroutings chosen are circuitous, involving 600 to 900 additional miles. In additional miles. In addition, only two of the movements eliminate an interchange, but these two require an additional switch at destination. In our

opinion maintaining the same number of interchanges for six moves and eliminating an interchange but adding a switch for the other two will make it difficult for applicants to offset the circuity in [724] their routes. For this reason, we believe these shippers will continue to use ATSF's southern corridor routings. Expanded revenues for the 12 moves, $1,628,104 will be deducted from ATSF's revenue loss.

Overhead

Of the 61 overhead movements in dispute, we agree with applicants regarding two. The first of these consists of a shipment of beer from Miller Brewing at Milwaukee, WI to Bend, OR routed MILW-Chicago-ATSF-Stockton-WP-Bieber-BN. ATSF diverted the movement 100% to MILW-Chicago-UP due to applicant's new competitive service and fewer carriers in the route. Two-line service is presently available through MILW-BN and MILW-Kansas City-UP routings. In light of this availability we conclude that use of routes with the fewest carriers is not as important to Miller Brewing as ATSF suggests. In the terms of service, we note that UP provides branch line service to Bend whereas BN serves Bend via its main line. In our opinion, this operational difference would tend to make BN's service superior to UP's. In light of these service and route selection factors, we believe it is unlikely applicants would attract all of these shipments.

The second movement consists of a shipment from Westvaco Corp. at Luke, MD to Los Angeles routed WM-BO-Chicago-ATSF-Pueblo-DRGW-UP. ATSF rerouted the movement to WM-BO-St. Louis-UP due to applicants' new competitive service and their switching of the consignee. The record shows that UP switches the consignee and provides reciprocal switching for ATSF and SP. In light of this switching, Westvaco had at its option several routing alternatives which would give the destination carrier its

long haul, would eliminate at least one interchange and would provide faster and more direct service (i.e. ATSF from Chicago, UP from Kansas City or Omaha). Use of the current route which shorthauls ATSF and UP in lieu of these alternatives indicates to us a desire to include DRGW in the routing. In light of this preference we do not believe this movement would be diverted to UP at St. Louis. Expanded revenues for the two moves, $229,439, will be deducted from ATSF's revenue loss estimate.

In summary, we find ATSF's estimate of revenue losses to be overstated. Of the movements diverted, we find that 104 will not be diverted and that 12 will be diverted at a percentage lower than that estimated by ATSF. By deducting expanded revenues of $9,850,581 from ATSF's estimated loss we find that ATSF's study supports a diversion loss to the new UP system of $54,326,456.

APPENDIX F-3

BURLINGTON NORTHERN INC.

To estimate the impact of the proposed UPRR-MPRR-WP consolidation, BN studied coat traffic originating at BN points in the Powder River Basin moving in unit train lots to power plants local to MPRR. Movements chosen were those applicants considered potentially divertible in various marketing studies due to completion and consummation of CNW's connector line into the Powder River Basin.[1] These movements included coal moving from mines at (1) North Antelope Jct. to Arkansas Power and Light at Newark, AR; (2) Jacobs Jct. to Arkansas Power and Light at White Bluff, AR; (3) Jacobs Jct. to Central Louisiana Energy Corporation at Boyce, LA; (4) Black Thunder to Oklahoma Gas and Electric at Ft. Gibson, OK; (5) Jacobs Jct. to Public Service of Oklahoma at Oolagah, OK and (6) Cordero to

[1] Footnote iliegible.

Kansas City Board of Public Utilities at Nearman, KS. Traffic volumes were based on actual tonnage and revenues for 1979 and 1980 and on UPRR tonnage projections for 1981 through 1985.

BN's Vice President of Coal and Taconite Pricing evaluated each movement, judging each to be entirely divertible from BN. Major reasons for the diversion included BN's inability to offer competitive service or competitive through rates with the newly merged [725] system and MPRR's close relationship with these utilities because it is the sole delivering carrier. Losses were estimated by applying rates in effect on December 31, 1980 to projected tonnages and prorating revenues between BN and MPRR on the basis of applicable divisions (a rate of $17.12 was used on the movement to Newark, AR since no rate was in effect as of December 31, 1980). The protestant expects the coal traffic from the Powder River Basin to amount to 20.2 million tons by 1985, yielding gross revenues of $189.7 million for BN. If the proposed consolidation occurs, BN estimates that it will lose all of this revenue.

Applicants did not submit any evidence in rebuttal to the BN coal diversion study. However, BN's conditions are based not so much on the future revenue losses it contemplates or any impact on essential services but more on the anticompetitive impacts that the proposed consolidation may have on the production and transportation of coal. These anticipated anticompetitive impacts are fully discussed and analyzed in our decision. There we concluded that the proposed transaction will have no anticompetitive impacts on coal transportation.

APPENDIX F-4

DENVER AND RIO GRANDE WESTERN

To determine the impact from the UP-WP, UP-MP and UP-MP-WP consolidations, DRGW studied a sample of its 1979 interline traffic. Rio Grande Motor Way traffic,

company materials and TOFC Plan I and V traffic were considered to be unaffected by the proposed transactions and were not studied. All other interline traffic was considered relevant and constituted DRGW's sample frame. Relevant traffic was stratified into six strata with stratum boundaries determined from a frequency distribution of revenues per car in $10 increments using the "cum square root of f" rule. Sample sizes were determined by DRGW's statistical consultant and random samples from each stratum were drawn. The total sample consisted of 1,502 car movements.

Study movement worksheets containing pertinent movement data and copies of available waybills were compiled for all relevant movements and given to DRGW's Assistant Vice President-Sales for evaluation. The evaluator applied either zero or 100 percent to represent the amount of diversion anticipated on a movement. Assumptions made included, among others, that DRGW would remain at its present size, that RI routings would be substituted with carriers presently operating and that the newly merged system and all other carriers would maintain and keep open all routes, rates, transit arrangements and channels of trade via junctions and gateways as they existed during 1979. A list of factors which influence the routing of traffic was developed and then used for making divertibility determinations. Reasons for the evaluations and new routes of diverted movements were marked on the movement worksheets. Diverted movements were sent to divisions personnel for calculation of new divisions and changes in revenues. Based on these calculations, DRGW estimates that it will lose $35,344,712 gross annual revenues if the UP-MP-WP consolidation is approved.

On brief, applicants contend that their traffic diversion estimate of $30 million for DRGW is more accurate than the protestant's estimate of $35 million. However, the applicants presented no evidence rebutting any of

DRGW's traffic diversion judgments. The record indicates that the principal difference between the estimates of the applicants and those of DRGW lies in the judgment as to the possibility of diversion. Applicants judgments appear more conservative than those of DRGW. Based upon the facts before us, we conclude that the maximum gross annual revenue loss DRGW will incur as a result of the UP-MP-WP consolidation is approximately $35.3 million.

[726] APPENDIX F-5

ILLINOIS CENTRAL GULF

To estimate its traffic and revenue losses resulting from consolidation of UPRR-MPRR-WP, ICG studied those movements in applicants' traffic study in which it participated. ICG's Vice President-Pricing performed the study utilizing movement data shown on applicant's study movement sheets. Assumptions used were those also used by applicants.

ICG did not dispute applicants' evaluation of movements judged divertible from ICG or applicants' calculation that diverting these movements would result in annual ICG revenue losses of $9,345,750. ICG differs, however, with 58 of applicants' nondivertible judgments, finding them divertible due primarily to applicants' ability to provide improved service through new single system capabilities. Expanded revenues associated with these additional diversions total $1,913,450, raising ICG's total estimate of annual revenue loss to $11,259,200. The principal market affected by ICG's total losses is its Council Bluffs-Chicago corridor, where ICG estimates it will lose $8,845,600 annually.

After participating actively in the evidentiary portion of the proceeding, ICG did not submit an initial or a reply brief arguing its position. It appears that ICG has in reality withdrawn from the proceeding. However,

even assuming that $11.3 million is the totality of the loss experienced by ICG, such a loss would constitute only 1.3 percent of its gross operating revenues. We believe such a loss will not impair ICG's ability to provide essential transportation services.

APPENDIX F-6

KANSAS CITY SOUTHERN AND LOUISIANA & ARKANSAS

KCS conducted a traffic diversion study to determine the impact on its traffic and revenues resulting from the proposed common control of UP, MP and WP. The traffic study data base consisted of all KCS line haul movements with settlement dates during the calendar year 1979. Once the data base was created, KCS's Senior Vice President and the Vice President of Market Development developed a list of categories of KCS line haul movements deemed to be irrelevant to the proposed consolidation because of geographical considerations, the specificity of routing and service characteristics, coverage by unit train agreements, or the movements captivity to particular routing due to the nature of the commodity and the location of origin or destination points on the line of another railroad. Of a total of 460,710 line haul movements, 415,204 were excluded. The remaining 45,506 cars constituted the relevant universe from which study samples were drawn. KCS divided the 45,506 car movements into four revenue strata. Based upon the judgment of the traffic experts as to the proportion of traffic that would likely be diverted and various statistics developed from the four revenue strata, sample sizes for each stratum were calculated, using traditional statistical formulas applicable to stratified random sampling. A total of 2,450 sample car movements was selected from the relevant universe.

The traffic evaluators developed a set of written instructions for determining the amount of revenue gains or losses. The instructions contained a list of assumptions that were considered in deciding whether and to what extent the proposed UP-MP-WP consolidation would effect the traffic handled on KCS's lines. It was assumed that the new UP-MP-WP system as well as other carriers will maintain and keep open all routes, rates, transit arrangements and channels of trade via junctions and gateways as they existed during [727] 1979. Further, the current California junction routes and gateways between WP and Southern Pacific will be maintained and kept open. In total, there were 9 general assumptions and 10 reasons why traffic would not be susceptible to diversion. In determining the gain or loss on each sample study movement, the specific percentage of 0% and 100% were used. In no instance was any other percentage used.

The evaluation of the 2,450 sample movements involved a six stage process. The first stage involved a preliminary evaluation to determine which movements could be eliminated immediately from further study. The evaluators believed that traffic meeting the following criteria clearly would not be affected by the proposed consolidation and thus were eliminated from further evaluation: (1) overhead traffic between points in Southwest Territory not served by the KCS and points east of the Mississippi River in Official and Southern Territories; (2) traffic to or from points in Kansas that originate or terminate on lines other than the UP; (3) traffic originating in eastern Canada; and (4) traffic originating in western Canada and handled by Canadian lines for interchange with their connections at Portal, ND, Fort Francies, Ontario and Noyes, MN. Based upon these criteria, 1,323 sample movements were excluded from further analysis.

The remaining 1,127 sample carloads were analyzed in the last five stages of the evaluation process. In the second stage, the study movement sheets (SMS) which were developed for the remaining sample movements as well as copies of the waybills were sent to the KCS sales office serving the origin territory. Sales personnel in the origin office transferred certain information from the waybill to the SMS. The information transferred included the names of the consignor and consignee. They also added any additional information they had about the movement. This included knowledge about the routing policy of the shipper, the shipper's tendency to favor one carrier versus another, and the impact of equipment on routing decisions. If the customer was a control account, the origin sales office indicated that in the appropriate place on the SMS. The origin sales office made their own independent determination based on the information available to them about whether or not the shipment would be diverted.

The third step in the evaluation process was to have the sample movements evaluated by the sales office serving the destination city. The destination sales office added any additional information they had to the SMS. Then they made their own independent evaluation of the divertibility of the movement. If they disagreed with a previous evaluation they noted their decision in the appropriate place and initialed the SMS. The fourth stage in the process was to have the sample movement evaluated by the control office if it were a control account. Here again, the sales office controlling the account made an evaluation of the divertibility of the movement based on the information available.

The fifth stage of the evaluation process was a review by the four Assistant Vice Presidents of Sales and the Vice President of Sales. They evaluated all previous decisions. Where there were disagreements they discussed them among themselves and initialed any changes on the SMS. The last stage of the evaluation consisted of a re-

view by the Senior Vice President, the final evaluator. He participated in the fourth stage of the process and then made his final evaluation.

Once the evaluation process was completed, revenues were assigned to each sample movement for which a loss was determined. The revenue losses were then expanded to the universe thus producing an estimated gross annual revenue loss of $8,535,000 for KCS. Precision achieved by KCS was a 3.1 percent standard error.

Applicants contend that KCS has overestimated its gross revenue loss by approximately $5.5 million. Of the 733 sample movements found to be divertible, applicants dispute KCS's judgments on 467. The applicants claim that KCS, when making its judgments, ignored such things as car ownership, routing influence, service, shipper routing policies, [728] improper routing and industry location. We agree with applicants that 272 sample movements will not be diverted but not necessarily for the same reasons applicants have set forth.

Soda ash—There were 130 sample movements of soda ash from Wyoming to Port Arthur on the Gulf of Mexico, routed UP-Kansas City-KCS. KSC's initial evaluators determined that there would be no diversion of this traffic. However, the final evaluator overruled the initial evaluators and diverted these soda ash movements to a new route via UP-Kansas City-MP. The evidence shows that KCS owns the Port Arthur facility where the soda ash is terminated. In addition, the record indicates that Port Arthur is the only port for export of soda ash except for Baton Rouge, LA which handles only a small amount. During cross-examination, KCS's final evaluator acknowledged that MP does not serve Port Arthur but he believes that MP will establish a port facility for soda ash in competition with the one that exists at Port Arthur.

We do not believe that this traffic will be diverted from KCS. Service appears to be a key factor in the export

movement of soda ash. The 789-mile KCS route from Kansas City to Port Arthur is the shortest and most efficient route for the movement of export soda ash. The producers of soda ash in Wyoming try to coordinate the movement of rail cars with the arrival of the ships at Port Arthur in order to minimize the expense of either ship demurrage or car demurrage. There are some time factor problems related to the arrival of the ships, which are usually charter vessels that may arrive at the port several days early or late. In order to assist in the coordination, KCS has established track storage and transit privileges for most if not all of the major soda ash producers in Wyoming.

Under these arrangements, the producers can preload their rail cars and move them to various storage points on KCS and hold them there to within 24 to 36 hours of the arrival of a vessel. Another key factor in the movement of soda ash is the fact that it cannot be contaminated by other commodities. KCS's facility at Port Arthur is especially equipped to handle soda ash and is the only facility along the Gulf that is able to handle large quantities of this commodity. In our opinion the uniqueness of KCS's facility as well as the service and storage arrangements provided by KCS will enable it to continue to handle this traffic in the future. We find that KCS will not lose the $1,654,374 attributable to these 130 sample shipments.

Applicants contend that an additional 18 sample shipments of soda ash for domestic use will not be diverted because of service and industry location reasons. These cars originated in Wyoming and were routed UP-Kansas City-KCS to W.R. Grace in West Lake Charles, LA. KCS diverted 14 of these shipments to a new route of UP-Kansas City-MP-Lake Charles-KCS. The other 4 shipments were rerouted via UP-Kansas City-MP-Fort Worth-SP. The new proposed routes would either shorthaul KCS or eliminate that carrier entirely. KCS's primary

reasons for these diversions were applicants' longhaul, routes and rates. W.R. Grace is served exclusively by KCS and SP and is not open to reciprocal switching. The evidence shows that domestic soda ash transportation charges are always paid by the consignee, which in this case was W.R. Grace. It is apparent that KCS and W.R. Grace have a good relationship. As the terminating carrier serving the consignee, KCS has considerable influence over the routing of this traffic and should be able to continue in its present routing. We conclude that the proposed consolidation will not have any effect on the routing of these 18 sample shipments and that KCS has overstated its revenue loss by $166,638.

Wood pulp—Applicants contend that 39 sample movements will not be diverted because of shipper routing policies, industry locations and service. This wood pulp traffic originated on KCS at International Paper (IP) in South Texarkana, TX and terminated at Modesto, CA. IP controls the routing of this traffic and is switched by KCS but open to MP. KCS performs some services for IP, such as daily yard checks and billing of outbound shipments [729] through the KCS chief clerk. According to the evidence, IP presently divides the traffic evenly between KCS and MP. KCS's primary reason for diverting this traffic was the possibility that UP-MP could affect a contractual arrangement with IP over their longhaul system route. It has been our experience that large shippers desire viable options for moving their traffic and thus allocate their traffic accordingly. We believe there will be no diversion of this traffic because it is in the best interest of IP to continue to ship via KCS in order to keep this carrier as a viable routing option. We find that KCS will continue to handle the 39 sample cars discussed and thus has overstated its revenue loss by $475,162.

Sulphate—There were 17 sample movements of sulphate which applicants claim will not be diverted because

of industry location. These cars originated at Battle Mountain, NV and moved via WP-Salt Lake City-UP-Kansas City-KCS to West Lake, LA. KCS rerouted this traffic via WP-Salt Lake City-UP-Kansas City-MP-Sherman-SP. The protestant believes that it will lose this traffic because of applicants' single line route and equipment. We agree with applicants that KCS ignored the fact that the consignee is only served by KCS and SP. It has been our experience that the terminating carrier which switches the consignee in most cases gets its longest haul. Because KCS switches the consignee and is presently receiving its longest haul, we conclude that it will continue to move this traffic and thus has overestimated its revenue loss by $210,282.

Corn & Sorghum Grains—Applicants assert that 12 sample cars which originated in Nebraska and were destined for Pittsburg, TX will not be diverted, for service reasons. KCS rerouted these cars from their present route of UP-Kansas City-KCS-Shreveport-LA to a new route of UP-Kansas City-MP-Fort Worth-SSW. KCS's primary reason for this diversion was a long-haul for applicants. The evidence indicates that KCS/LA serves the consignee and provides reciprocal switching for SSW. In addition, it was pointed out that the route over MP from Kansas City to Fort Worth is more circuitous than KCS's route between Kansas City and Shreveport. As the terminating carrier which switches the consignee, we believe that KCS/LA has enough influence to remain in the routing of this traffic and retain its long haul. Thus, we find that KCS will not lose these 12 sample movements with projected revenues of $144,511.

Industry Location—We have identified 12 sample movements where the consignee is located on KCS/LA at a closed point. Ten of the movements terminated in Louisiana (4 at Shreveport; 2 at Pineville; and one each at West Lake Charles, Heflin, New Orleans and Essen).

The remaining 2 shipments terminated at Sulphur Springs, TX. Applicants originated 9 of the 12 movements. In all but one case, KCS/LA received its longest haul from Kansas City. The primary reason for KCS's diversion of this traffic was applicants' long haul. In addition, KCS listed equipment as a consideration for diversion for 7 of the 12 sample movements. The study movement sheets show that KCS's initial evaluators judged no change in the routing for 10 of the 12 movements. These judgments were changed to a loss by the final evaluator. It is an axiom in the railroad industry that a carrier has substantial influence over the routing of traffic which originates or terminates at a local point on its line. As the terminating carrier which serves the consignee exclusively, KCS/LA has enough influence over the routing of these 12 sample movements to be able to handle this traffic from the present interchange points. We conclude that KCS has overstated its diversion loss by $106,567.

KCS equipment—There were 21 sample shipments that moved in KCS cars where applicants contend that the protestant ignored car ownership when making its diversion judgments. These cars originated at Elwood, KS (4); North Baton Rouge, LA (4); West Monroe, LA (3); New Orleans, LA (3); two each at Fort Smith, AR, South Texarkana, TX, and West Lake, LA and one at Barretts, MT. We agree with applicants that KCS did not take into consideration the fact that these shipments moved in KCS equipment. It is [730] apparent that KCS's equipment was one of the primary factors that caused these 21 sample shipments to be routed over its line. We foresee no reasons why KCS will not be able to continue to supply the equipment for this traffic and remain in the routing. We find that KCS has overstated its revenue loss by $248,342.

Route not affected by proposed consolidation—We have identified 23 sample movements with expanded revenues

of $283,583 where MP could divert the traffic without the UP-MP-WP consolidation. Five of the sample cars were movements diverted by KCS to a new route over MP. Three of these 5 cars originated at Maryland, LA and terminated in Omaha, NE; one car originated at New Orleans, LA and moved to Omaha, while the last car in this group originated at North Baton Route, LA and was transported to McPherson, KS. In all five cases, MP serves both the origin and destination and can handle them single-line today. Six of the 23 sample movements terminated on the SP at Nacogdoches, TX. Five of the 6 sample cars originated at Omaha and one originated at Topeka, KS. All 6 shipments were rerouted UP-Kansas City-MP-Sherman-SP. MP presently serves Omaha and Topeka and by reciprocal switching could have moved these cars from origin to Sherman, TX for interchange with SP.

Four of the 23 sample movements originated at Topeka and moved via Kansas City to Shreveport, LA. In all four cases, MP serves the consignor and consignee through reciprocal switching arrangements and can presently handle the traffic from origin to destination. Six of the 23 sample shipments originated at Topeka and moved UP-Kansas City-KCS-Ashdown-GNA to JJR Spur, AR. KCS diverted these 6 cars to a new route of UP-Kansas City-MP-Nashville-GNA. MP presently serves the consignor through reciprocal switching and could move the 6 shipments single line from Topeka to Nashville for interchange with GNA today. Two of the 23 sample cars originated at Salina, KS and were routed UP-Kansas City-KCS-Shreveport-LA to their destination in Heflin, LA. KCS rerouted these shipments via UP-Kansas City-MP-Hope-LA. The consignor in Salina is open to MP through reciprocal switching. Thus, this traffic can presently be routed over MP from origin to the proposed interchange point at Hope. In our opinion, all 23 sample movements are presently susceptible to rerouting via MP from origin to destination or connec-

tion without the benefit of this consolidation. Therefore, we find that KCS will not lose the $283,583 associated with these 23 sample cars.

Conclusion—In summary, we find that KCS's estimate of revenue losses to be overstated. Our analysis shows that of the movements diverted by KCS, 272 with expanded revenues of $3,289,459 will not be diverted. By deducting these revenues, we conclude that the maximum gross annual revenue loss KCS may experience as a result of this consolidation is approximately $5.2 million.

Market power diversion study—The protestant conducted an additional study in order to measure the impact that applicants' increased market power resulting from the proposed consolidation would have on KCS traffic. The data base for this study was a combination of the sample drawn for the opposition traffic study and the sample drawn for the traffic study submitted in the KCS inconsistent application (the "gains study"). The sample developed in the opposition traffic study was designed to extract traffic which would be affected by the proposed consolidation; this included traffic moving between the southwest and west. The gains study, which was based upon KCS and MP data bases, was designed to estimate the impact on traffic on the line extensions requested by the KCS in its inconsistent application. Traffic in this sample flowed primarily between (i) the southwest and (ii) the northeast and south, although there were some movements to the northwest.

The opposition traffic study and gains study samples were combined in the following manner. State-to-state pairs that were common to both studies were determined and the carload counts in each sample were displayed. Overlapping state-to-state pairs were kept in [731] or removed from a particular sample based on the following criteria: (a) Where the car counts were not equal, the state-to-state pair was kept in the sample with the largest car count and removed from the other sample. (b)

Where the car counts were equal, the state-to-state pair was kept in the opposition traffic study and removed from the gains study. All traffic that had been wholly diverted in the opposition traffic study was eliminated from the data since it has previously been diverted as a result of the proposed consolidation. Partial diversions (shorthauls) were retained. The expansion factors assigned to each record in the original studies were retained and remained unchanged for this market power study sample.

The next step in the process was to extract the records for all traffic originating or terminating at the following common points: Kansas City, Joplin, Pittsburgh, Fort Smith, Hope, Sallisaw, Baton Rouge, New Orleans, Shreveport, Alexandria, Lake Charles, Texarkana, Jefferson, Dallas, Beaumont and Bokoshe. For each record, a study movement sheet (SMS) was printed which showed origin and destination city and state, car initial and number, waybill data and number, 7 digit STCC, weight, car type, total freight revenue, KCS revenue and percentage of total revenue and complete route of movement. For those records for which SMSs had been produced in previous studies, the relevant information was transferred to the new SMS and a copy of the waybill and abstract was attached. For those records where an SMS had not been produced, a copy of the waybill was obtained wherever possible and attached to the SMS. The SMSs provided the base data from which the initial evaluators and the final evaluator made their decisions.

The evaluation procedure included two steps. The SMSs were first reviewed by a group of initial evaluators and their decisions were reviewed and either accepted or modified by the final evaluator. A written memorandum was given to the evaluators describing the purpose of the study, the factors which influence market power and how they may be used to divert traffic. The factors considered as influencing applicants' market power were (a) equip-

ment supply; (b) economic resource; (c) ability to provide special service; (d) coverage of multiple facilities of shipper; (e) market force coverage; (f) territorial coverage of system; (g) desirability of movement; and (h) potential for contract rate. The initial evaluator completed a questionnaire for each SMS. The questionnaire was divided into three major parts: (a) Staggers Act reciprocal switching evaluation, (b) market power evaluation, and (c) potential for regaining traffic with KCS's proposed line extensions.

After the final evaluation was completed, the diverted cars were tabulated and expanded to the universe. To avoid double counting, certain state-to-state pairs which had been evaluated in the opposition traffic study and which resulted in diversions, and were also evaluated in the market power study and resulted in diversion, were determined and the diversions associated with them were eliminated from the market power study. There were 12 movements which in the opposition traffic study were only partially diverted but which were completely diverted in the market power study. The revenue loss shown in the market power study was the revenue remaining after the partial loss. The results of the market power study indicates that KCS may lose an additional $5.1 million gross revenues and approximately $1.7 million net revenues to the applicants.

Both the applicants and DOT are critical of KCS's market power study. Applicants point out that KCS identified, as aspects of applicants' market power, applicants' ability after consolidation: to respond more quickly to market demands; to improve their equipment utilization; to provide special services, including faster service; and to offer lower rates. Applicants readily acknowledge that the proposed consolidation will enable shippers to realize these benefits. However, applicants argue that the factors enumerated by KCS are hardly suggestive of market power. In addition, the applicants

state that the study is permeated by methodological flaws and omissions that render its conclusions wholly unreliable. [732] As examples applicants point out that KCS failed to give routings for any market power diversions. KCS's market power diversions were premised upon facility substitution. The protestant diverted traffic in its study for reasons wholly unrelated to the impact of the proposed consolidation. Finally, the applicants contend that there are serious statistical errors undermining the reliability of KCS's market power study.

DOT argues that KCS's market power criteria do not measure increases in applicants' market power (reductions in competition) resulting from the transaction. DOT points out that KCS determined that market power diversions would occur where MP today serves points in single-line service. Presently, KCS is handling this traffic in joint-line service with other carriers—not MP—and its ability to serve those points in joint-line service after the UP-MP-WP consolidation will not be affected. Additionally, DOT asserts that KCS's ability to build unloading facilities or attract industries to its lines is not foreclosed or reduced by the proposed consolidation.

We believe that some of the above criticism is justified. Both the applicants and DOT have argued that the KCS diverted traffic in this study is unrelated to the impact of the proposed transaction. We agree. Approximately four-fifths of the projected 8,030 movements diverted in the market power study are attributable to KCS's gains study sample. The gains study was not designed to illuminate the traffic which was merger-flow oriented; the opposition study was designed for that purpose. The gains study was designed to identify traffic which flowed primarily within the southwest or between the southwest and the east, or the southwest and the south. Thus, the traffic included in the gains study was in areas where only one applicant road participates presently and where only one applicant carrier will participate after the consolidation.

Of the applicant carriers, only MP serves the southwest and only MP can participate in movements originating or terminating in the southwest and moving to/from the south or east. Therefore, the proposed consolidation would have no impact on the movement of this traffic. For example, KCS judged a movement from South Texarkana, TX to Memphis, TN routed KCS-Poteau-SLSF to be divertible due to applicants' market power. However, MP is the only applicant line which can participate in this movement. Since MP serves both the origin and destination, this traffic can move via MP single-line today without the benefit of the proposed consolidation. Another example was a shipment routed SP-New Orleans-L.A. from Houston, TX to North Baton Rouge, LA which KCS found to be divertible. Of the applicant railroads, only MP serves these two points.

It is evident that most of KCS's market power study was based on traffic which was geographically irrelevant to the proposed consolidation. Furthermore, some of KCS's diversions were attributable to its judgment that MP would seek to open certain closed points pursuant to the reciprocal switching provisions of the Staggers Act. These diversions are entirely related to the Staggers Act and not to the proposed transaction. Without this consolidation, MP can still seek to have the closed points on KCS open via reciprocal switching. Consequently, the results of KCS's market power study show little relationship to the proposed consolidation. In our opinion, little weight can be given to the results of this study.

APPENDIX F-7

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD

To determine the impact of the UPRR-MPRR-WP consolidation on its traffic and revenues, MILW studied 100% of its traffic interlined with applicants with waybills dated from April 1, 1980 through September 30,

1980. The Milwaukee Traffic Revenue Data [733] Base, containing all MILW line haul movements, provided movement data for the study. MILW company material, unit coal trains, traffic interchanged with MPRR at Chicago, traffic interchanged with MPRR at Kansas City involving Southwestern or Southern Freight Rate territories and traffic involving MILW stations and Kansas City, MO moving through Savannah, IL were determined to be unaffected by the proposed consolidation. Study movement sheets were prepared for the remaining 3,787 movements and given to MILW's Director-Merger Studies for evaluation. No written or oral instructions governing the evaluations were made. Movements were evaluated on a 0-100% basis and reasons for the evaluations were marked on the study movement sheets. Movements judged divertible were sent to divisions personnel for calculation of new divisions and changes in MILW revenue. Based on these calculations, MILW estimates it will lose $1,732,464 annually. All diverted movements consisted of movements interchanged at Kansas City with the preponderance ($1,197,100) being traffic received and terminated by MILW.

Subsequent to the completion of the opposition traffic study MILW conducted an additional study to determine the impact upon its revenues if the applicants were to curtail their routes via Kansas City. MILW reviewed its opposition traffic study worksheets and projected that it would lose an additional $3,715,974 in gross annual revenues if Kansas City were not maintained as an alternate. competitive gateway with Chicago.

Applicants contend that even if MILW's $1.7 million estimated gross revenue loss is accepted, the diversionary impact of the proposed consolidation is insignificant. According to applicants, such minimal traffic diversions will have no impact on the ability of MILW to play a role as a competitor or to provide essential services. As for MILW's assertion that it will lose an additional $3.7 mil-

lion if the consolidation is approved without standard DT&I conditions, applicants argue that because MILW's Kansas City-Chicago service clearly play a commercially important role in this corridor such protection is not needed. Applicants point out that the ability of MILW to provide single-line service through the Chicago terminal permits it to offer superior service via Kansas City for many shippers who originate and terminate traffic on its lines north and west of Chicago. The traffic attracted by these services makes it necessary for other carriers to work with MILW in Kansas City, a fact that applicants state is demonstrated by MP's continued support for and use of MILW run-through trains despite the availability of MP's own line via St. Louis.

The applicants presented no evidence refuting the reliability of WILW's traffic studies or the validity of its diversion judgments. Consequently, we conclude that the maximum gross annual revenue loss which MILW may experience if the proposed consolidation were granted without DT&I type conditions would be $5.4 million. Nevertheless, MILW's traffic expert testified that even if we were to approve this consolidation without conditions no existing MILW shipper would be without service. Therefore, we find that no essential services provided by MILW would be discontinued if the UP-MP-WP consolidation is consummated.

APPENDIX F-8

MISSOURI-KANSAS-TEXAS

Katy prepared a traffic study to estimate its losses resulting from the proposed consolidation of the applicants' system lines. The study was comprised of all movements (carloads and trailerloads) that were settled during 1979, including both local and interline. The only commodities excluded from the study were selected movements of nonmetallic minerals, except fuels (rock) and selected move-

ments of coal (trainload annual volume), which were defined as non-divertible.

[734] The protestant stratified its traffic into 16 distinct and homogeneous strata, including two strata defined as non-divertible. A pilot study consisting a 30 randomly selected movements from each stratum was conducted. The pilot study provided results (estimates of variances within strata) upon which the actual sampling plan was based. In addition, the pilot study gave Katy an opportunity to check the data collecting and the computational procedures. The results of the pilot study showed that the size of the final sample should be 4,601 movements. For each sample movement, a study movement sheet was produced containing the information and data recommended in Appendix C of our November 8, 1979, Ex Parte No. 282 (Sub-No. 3) guideline for traffic studies.

Katy's Vice President-Traffic and Assistant Vice-President-Sales and Services evaluated each sample movement for possibility of diversion. In making their traffic study, the evaluators considered the many factors which influence shippers' routing of cars and choice of carriers. In addition to the factors of single-line service, single-line control of rates, and equipment, the evaluators also considered other items which influence shippers, such as tracing shipments, avoidance of interchanges, which railroad serves the industry, and the shippers' desire for competitive routes. While no written instructions were prepared for the evaluation, a list of factors containing 9 reasons for diversions and 6 reasons for nondiversions was compiled and used in making divertibility judgments. In every case, the evaluators used only 100 percent diversion or no diversion.

Katy found that 2,357 movements out of its 4.601 car sample were divertible. Expansion to 100 percent yielded 25,919 movements which could be lost to the new consolidated system, for an estimated annual Katy revenue

loss of $23,459,000. The true value of this estimate has a 95 percent chance of being covered by the interval $22,771,000 to $24,147,000. Katy expects that at least 90 percent of the diversion loss will occur in the first year following the proposed consolidation, and the remainder will occur in the second year.

Applicants contend that non-applicant traffic was not a significant issue in MKT's traffic study and therefore the differences between its and MKT's estimates were due almost entirely to conflicts in diversion judgments. Applicants argue that Katy's study was biased because its evaluators presumptively diverted movements interchanged with UP unless it was shown that MKT had some powerful and compelling attraction with respect to a particular shipment. In addition, applications assert that MKT consistently diverted movements due to applicants' new single-system service, notwithstanding good relationships between Katy and the shipper, its origination of the movement and the shipper's rejection of single-line alternatives in 1979. Finally, applicants claim the MKT judgments were premised to a substantial extent on the assumption that the existing UP-MKT run-through train would be terminated after the consolidation. Applicants point out that they have offered to continue the operation of that train, or if MKT prefers, to pre-block and deliver Katy traffic so that it will be available as promptly as it was in 1979. More specifically, applicants contend that the gross revenue loss estimated by Katy is overstated by $9,276,605. Of the 2,357 sample movements found divertible, applicants dispute the judgments on 933 movements.

Local traffic—The local group of disputed movements is made up of 28 sample shipments accounting for revenues of $256,670. Applicants claim that this traffic will not be diverted because Katy has routing influence and provided some of the equipment. Four of the 28 local sample movements (with expanded revenues of $21,245)

were switched to Katy at the origin by UP and moved single-line to a closed facility served by Katy at the destination. We conclude that Katy will not lose this traffic because, as the line-haul railroad serving the destination facility, Katy will have enough influence to continue the present routing. Three of the 28 shipments (representing expanded revenues of $38,051) were switched to Katy at the origin by UP and moved via MKT to the destination where the consignee is served by Katy but open to reciprocal switching. Two of these shipments were transported in Katy [735] equipment and one moved in a Conrail car. Katy's reasons for diversion of these sample movements were single-line service, consignor track location and equipment. The protestant has ignored the facts that (1) it serves the consignee, (2) two of the shipments moved in its equipment while the third shipment was transported in a nonapplicant car and (3) Katy also has single-line service from origin to destination. We believe that the proposed consolidation will not affect the routing of these sample movements and find that this traffic will not be diverted.

One of the 28 local sample movements (representing $5,661 in revenue) was switched to Katy by a terminal switching carrier in St. Louis and moved to a facility in Kansas City served by UP but open to reciprocal switching. This shipment was transported in a Katy car. MKT judged this car to be divertible because of applicants' single-line service and consignee track location. Several carriers have single-line routes between St. Louis and Kansas City all of which are more direct than Katy's route. The industries involved are both open to switching and could route this traffic over other single-line routes today, including MP. It is obvious that the use of Katy's equipment influences the routing of this traffic. We see no reason why MKT will not be able to continue to provide this equipment, and find that Katy will remain in the routing. Thus, we find that of the 28 sample movements contained in the local traffic group, 8 will not be

rerouted. Katy has overestimated its diversion exposure in this local traffic group by $64,957.

Overhead traffic—There are 29 disputed sample movements of overhead traffic representing expanded revenue of $534,501. Applicants argue that these 29 cars will not be rerouted primarily because of car ownership. Katy listed several different reasons for diversion, some of which were consignor track location, equipment and single-line service. Twenty-four of the 29 sample shipments with projected revenues of $439,520 moved in Katy equipment. Eight of the 24 shipments were diverted by Katy to a new single-line UP route. In all 8 cases Katy's reason for diversion was single-line service and consignor track location. However, MP through reciprocal switching could have transported 6 of the 8 movements single-line from origin to destination today. Three of the 24 sample movements originated at Economy, PA and were routed CR-St. Louis-MKT-Kansas City-UP to Seattle, WA. Katy's reason for this diversion was extended applicant route service from origin junction. However, Katy overlooked the fact that BN provided this service from St. Louis to Seattle in 1979 and could have supplied this route if the shipper had so desired. It has been our experience that when a carrier's car is utilized in a movement, the shipper, if at all possible, will give that carrier a line-haul. It is apparent that Katy's equipment was one of the primary factors that caused these 24 sample shipments to move over its line. We foresee no reason why Katy will not be able to continue to supply the equipment for this traffic and remain in the routing. We conclude that Katy has overestimated its revenue loss by $439,520.

Forwarded traffic—Applicants assert that 58 sample movements (with projected revenues of $305,423) where Katy was the originating line-haul carrier will not be diverted. In 52 of these movements, applicants disputed Katy's judgments either because the protestant ignored

the car ownership or its routing influence. Applicants provided miscellaneous reasons for no diversion of the other 6 movements. Of the 58 sample movements, 28 shipments (accounting for expanded revenues of $143,346) were transported in MKT equipment. In all but one case, Katy's primary reason for diversion was applicants' single-line service. Katy listed consignee track location and equipment as additional reasons for rerouting many of these 28 shipments. Based upon the sample movement sheets, Katy provided some switching for the consignor at the point of origin on at least half of the 28 sample movements. We find that Katy will continue to handle these 28 movements because Katy, as the originating carrier whose equipment was utilized in the movement of [736] this traffic, has the maximum influence on its routing. Three of the 58 sample movements (representing revenues of $19,569) originated at points served by Katy but open to reciprocal switching. Two of the three shipments originated in Dallas, TX and were routed MKT-Kansas City-UP to either Clearfield, UT or City of Commerce, CA. The third sample shipment moved MKT-Kansas City-UP from Coffeyville, KS to Lucerne, CO. Katy rerouted these 3 sample movements to a new route via UP because of single-line service and the consignee's track location. As the originating carrier which switches the consignor, MKT has considerable influence over the routing of these 3 sample movements. We believe that Katy will be able to exert enough influence over the routing of this traffic to continue to handle it. For the above reasons, we find that Katy will remain in the routing for these 31 sample movements and thus has overstated its revenue loss by $162,915.

Received traffic—The received traffic group consists of 814 disputed sample movements representing projected revenue of $7,993,298. Applicants contend that 395 of the 814 sample movements will not be diverted because of car ownership. Of the 395 sample cars, we have identified 143 shipments (accounting for revenues of $1,603,-

625) which were transported in MKT equipment. These 143 shipments were routed UP-Kansas City-MKT to destinations in Texas, Oklahoma, or Kansas. Single-line service was one of the primary reasons for Katy's diversions. Transit or consignor's track location were also noted as reasons for many of these diversions. As we have mentioned previously in this and other analyses, equipment is a significant factor in the routing of traffic. When a carrier's car is utilized for a shipment, that carrier usually gets a line-haul if feasible. Thus, we find that Katy will continue to handle these 143 sample movements and has overstated its diversion loss by $1,603,625.

Applicants believe that 127 of the 814 disputed movements will not be rerouted because of the location of the industry. Of the 127 sample movements, 121 shipments were movements to closed points on MKT. In addition, we identified 2 other movements which were included in the received traffic group that terminated at closed points on the MKT. For every movement, Katy contends that the new consolidated system will be able to shorthaul MKT via junctions such as Dallas, Denison, Denton and Fort Worth, Texas rather than interchange the traffic at Kansas City. The evidence indicates that in several of these movements Katy could have been shorthauled in 1979 by SP from West Coast origins but was not. In addition, UP was a bridge carrier on nearly one-half of the 123 sample movements, thus having the least influence on the routing of this traffic. We have found that a terminating carrier which serves a consignee exclusively has substantial influence over the routing of that traffic. In our opinion, Katy has enough influence to be able to continue to handle this traffic from Kansas City to its destination. We find that Katy will not lose the $598,764 revenue associated with these 123 sample movements.

Applicants claim that Katy will not lose 65 of the 814 disputed sample movements because of MKT's routing influence. We have identified 43 of the 65 sample move-

ments where we agree with applicants that MKT has considerable routing influence. As for the remaining 22 shipments, we believe that UP has more influence than Katy because, for example, the movement originates at a closed point on UP, MP also switches the destination, equipment, etc. On all 43 movements, Katy performed the switching for the consignee and received its longest haul from Kansas City, while UP performed only bridge service. As the terminating carrier which switches the destination, Katy has substantially more influence over the routing of the traffic than does UP which only performs overhead service. We conclude that Katy will continue to handle these 43 sample movements and has overestimated its diversion loss by $277,066 attributable to this traffic.

Applicants assert that 217 of the 814 disputed sample movements are nondivertible due to Katy's service advantage. Of the 217 sample movements, 104 cars were movements of [737] soda ash routed UP-Kansas City-MKT from Wyoming to Waco, Dallas, Houston or Garland, TX. Katy's reasons for diverting these movements were single-line service, consignor's track location and in some cases equipment. Approximately two-thirds of the 104 sample shipments moved in equipment which was assigned to car pools for the shippers. Katy's sample movement sheets indicate that MKT contributes to these car pools. The other third of the shipments moved in privately owned equipment. Therefore, we do not believe that equipment is a major diversion factor. Katy switched the consignees in all 104 instances, although in 15 cases MKT and SP share this responsibility. Applicants claim that if this traffic were to be rerouted over MP there would be a one- or two-day switching delay on both inbound loaded and out-bound empty movements. However, it appears from the evidence that this delay would be a matter of hours (12 to 14) rather than days. Thus, transit time does not appear to be a major diversion factor.

The record also indicates that the receivers of soda ash pay the transportation charges. Katy's traffic evaluators acknowledged that they have good relationships with the receivers of soda ash shipments. Since the receivers pay the freight charges, they have considerable influence on the routing of the traffic. We believe that with an aggressive solicitation effort, Katy will be able to continue to participate in the movement of these soda ash shipments. Accordingly, Katy's estimated loss will be reduced by $1,387,740, the revenue associated with the 104 sample shipments.

Fourteen of the 217 sample cars were movements of passenger cars from Ford Motor Company's plant at Milpitas, CA to Tulsa, OK routed WP-Salt Lake City-UP-Kansas City-MKT. The destination was a closed point on MKT. Katy believes that it will be shorthauled via a new route of UP-Tulsa-MKT because the applicants will be able to extend their haul under the proposed consolidation plan. The equipment used for the movement of this traffic is assigned to car pools to which Katy makes a contribution. In our opinion, Katy as the terminating carrier which serves the destination exclusively and makes a contribution to the equipment pool has enough influence on the routing of this traffic to be able to continue to handle it from Kansas City. We find that Katy will not lose the $44,709 revenue attributed to this traffic.

Of the 217 sample shipments, 14 were movements of paper bags from Safeway Stores in Toledo, OR to Safeway Stores in Garland, TX routed SP-Ogden-UP-Kansas City-MKT. Katy serves Safeway at the destination and switches its traffic. Katy believes that this traffic will be diverted to an SP-Ogden-UP route. The protestant assigned as the reason for this diversion extended applicant service from origin junction. The record indicates that Safeway has a policy of giving a line haul to its origin and destination railroads. It is our conclusion that Katy, as the terminating carrier which switches the consignee, has more influence on the routing of this traffic than does

UP which is only a bridge carrier in the movement. Therefore, we find that Katy will not lose the $83,182 attributable to these 14 sample movements.

Summarizing our finding with regard to the 814 sample movements in the received traffic group, we conclude that 441 will not be rerouted and that Katy has overestimated its revenue loss by $3,995,086.

In sum, we conclude that Katy's diversion estimate of $23.5 million, derived from 2,357 sample movements, appears to be overstated by $4.7 million and that the maximum gross revenue loss which Katy may experience as a result of this transaction is approximately $18.8 million.

[738] APPENDIX F-9

SOUTHERN PACIFIC

To estimate the traffic and revenue impact from consolidation of UPRR-MPRR-WP, SP studied a sample of its 1979 system traffic. The study population consisted of all revenue cars having 1979 waybill dates. The primary traffic base used was SPT/SSW's settlement records data base enhanced with customer information from SPT's TOPS waybill file. U.S. mail traffic; unit train coal traffic from Codero, WY to Elmendorf, TX; unit train sulphur traffic from New Gulf, TX to Spindletop, TX and traffic moving within certain specified geographic regions were considered nonrelevant and were not sampled. Remaining traffic was stratified according to SPT/SSW system local and SPT/ATSF interline traffic (stratum 1) and SPT/SSW interline traffic not included in stratum 1 (stratum 3).[1] Based upon pilot studies performed for each stratum, SP selected 876 sample movements (.33%) from Stratrum 1 and 4,000 movements (.14%) from stratum 3. Samples were drawn using systematic subsampling techniques and simple random sampling techniques, respectively.

Study movement sheets (SMS's) were prepared for each sample movement and sent to origin and destina-

[1] Stratum 2 consisted of nonrelevant traffic.

tion sales offices for completion and/or verification of objective data regarding each movement. The completed sheets together with corresponding abstracts and waybills were then geographically sorted by location of routing control and given to selected SPT traffic officers for initial evaluation. Written instructions, assumptions and traffic schedules were prepared and distributed to each evaluator prior to evaluation. Assumptions included, among others, that: (1) SSW would operate RI lines between Santa Rosa, NM and St. Louis, MO; (2) single line service encourages routing over the route offering such service; (3) equipment ownership and assignments would remain constant; (4) TOFC/COFC shipments are susceptible to diversion to or from carriers with facilities within pickup and delivery limits of the TOFC/COFC origin or destination; (5) service provided by all rail carriers other than applicants would remain the same after the merger as it was in 1979 and (6) the Central Pacific Solicitation Conditions would remain in effect. Evaluations were made using percentages of 0, 25, 50, 75 and 100%. SPT's Assistant Vice President-Sales, Pacific Southwestern Region reviewed each sample movement for final evaluation. Procedures and assumptions used for final evaluation were the same as those used by the initial evaluators.

Revenue and cost changes for the diverted movements were computed, resulting in the following SPT/SSW losses:

Precision achieved with SP's gross revenue estimate is a $5,900,000 (5.6%) standard error.

	SPT	SSW	Combined
	($000's)	*($000's)*	*($000's)*
Gross Revenue Losses	$100,536	$4,623	$105,159
Estimated Cost of Handling Lost Traffic	68,558	5,698	74,257
Net Revenue Loss	31,978	(1,075)	30,902

[739] Applicants dispute SP's diversion of 296 movements, totaling $82,723,972 in expanded revenues. In contesting SP's diversion judgments, applicants argue that SP (1) failed to consider the routing policy of the shipper or receiver controlling the movement, (2) failed to acknowledge the relative routing influence of originating, terminating and bridge carriers, (3) failed to consider factors that governed particular routings, (4) failed to consider the routing influence of SP equipment, (5) diverted shipments to routings of such extreme circuity that they would not be tolerated by the affected shipper or solicited by the consolidated system, (6) failed to consider factors that preclude diverted routings (transit, clearance, absence of rates) and (7) failed to consider factors that influence routing of TOFC/COFC traffic. Applicants presented on brief no criticisms of SP's study methodology or sampling procedures.

SP argues that it did consider shipper/receiver routing policies, relative routing influence of originating, terminating and bridge carriers and all relevant factors influencing 1979 routings. In addition, SP argues that applicants' equipment and facility substitution arguments are without merit, that applicants ignore the fact that they diverted movements to circuitous routes, that railroad ownership of TOFC shipper facilities does not play an important role in influencing routing, that applicants have greatly exaggerated the extent to which SP ignored transit, rate and clearance factors and that applicants' assertion that SP underestimated its TOFC competitiveness via Tucumcari is without merit. SP concedes however that 23 movements are not likely to be diverted and an additional 8 will be diverted at a lower percentage. As a result, SP agrees that its loss estimate is overstated by $6,293,331.

We have analyzed SP's traffic study and find it to be a properly executed probability sampling study. Similarly, we find the judgments made by SP to be well rea-

soned and carefully performed. Due to the many factors involved in route selection, the arguments presented by applicants and SP have been considered as they relate to specific movements. Based on these arguments, we agree with applicants that certain of the movements will most likely not be diverted. These movements and the reasons which we believe will hold this traffic to SP are presented below. Movements not discussed are found to be diverted for reasons presented by SP.

General Motors

Applicants identified 35 General Motors (GM) shipments which they contend will not be diverted (UP-H (VS)-237, Appendix III-A). Of the 35, 30 consist of set-up automobiles or motor vehicles moving to GM in Oakland; two of auto parts moving to GM in Oakland and three of auto parts moving to GM in Warm Springs. On brief SP concedes that the moves to Warm Springs will not be diverted and has incorporated these changes in its revised diversion estimate. As to the other moves, SP argues that each will be diverted to WP routings via Salt Lake City due to applicants' faster or more direct service, single system service, fewer carriers in the route, shipper location, equipment furnished and new marketing strategies. Applicants argue the movements will not be diverted due to GM's routing policy of favoring originating and terminating carriers, GM's practice of rarely altering routings, SP's faster and more direct service and the significant cost applicants would incur to purchase and substitute their equipment for SP's. The record shows that GM is a large, powerful shipper, virtually immune from rail carrier efforts to alter its routing practices; enjoys a good relationship with SP, UP and MP; and generally favors its serving carriers consistent with service and equipment.

Regarding the movement of automobiles to Oakland, the record shows that GM's auto facility in Oakland is located on property owned and exclusively served by SP;

that substantial investment has been made in this facility; that WP operates an auto facility across the [740] street from SP's; that WP's facility is presently fully committed; that WP's facility cannot readily be enlarged due to the unavailability of land in the immediate area and that WP's efforts to expand its existing TOFC/COFC facility in Oakland have been thwarted by the Port of Oakland which is WP's landlord for that facility. Our review of applicants' proposed schedules and operating plan leads us to believe that present SP routings will be competitive with future UP-WP overland routings. In light of this ability to provide a competitive service, the inability of carriers to influence GM's routing practices, the substantial investment already made in GM's present facility, the potential difficulties WP would have in acquiring unloading capacity to meet GM's transportation needs and the absence of evidence suggesting GM is interested in moving its facility, we believe SP will retain this traffic.

Regarding the movement of parts to Oakland, the record shows that GM's auto parts depot was located at an SP point open to WP. Sometime after 1979, the depot was closed and moved to Sparks, NV, a closed point on the SP. Applicants and SP both indicate that GM generally favors its serving carriers when supported by service and equipment. Applicants state this policy reflects GM's desire to insure adequate maintenance and investment in facilities and tracks serving its plants. As a result of this policy and our belief that SP will provide a competitive service to Oakland via Ogden, it is our opinion that GM would continue using SP in the routing of this traffic. Expanded revenues for the 32 movements, $16,660,376, will be deducted from SP's traffic loss.

Ford Motor

Applicants identified 15 Ford Motor Company shipments to or from Milpitas, CA which they contend will not be diverted due to SP's assignment of equipment and

SP's competitive service (Appendix III-B). Fourteen of these shipments consist of movements through Kansas City to the SP at Ogden and are commonly referred to as Ford FAST movements. The last shipment consists of a movement of automobiles from Milpitas to Remount, TX (near San Antonio). On brief SP concedes this latter movement will not be diverted and has adjusted its revenue loss estimate accordingly. As to the Ford FAST traffic we agree with SP that changes in Ford's routing practices would result in diversion of this traffic to the consolidated system.

US Steel

Applicants identified 45 movements totaling $9,814,130 in SP revenue losses moving from U.S. Steel (USS) at Geneva, UT to USS at Pittsburg, CA, which they contend will not be diverted (Appendix III-C). SP diverted each movement 75% primarily for service, equipment and traffic allocation reasons. UP disputes these diversions stating that SP possesses no service disadvantage in light of USS's switching practices, that SP participates in the movements' short line routings and that it is unlikely applicants would purchase new equipment to replace SP equipment given the low profitability of this traffic. Considerable testimony was presented regarding these movements including: (1) USS uses UP-SP; UP-WP; DRGW-SP; DRGW-WP routings between Geneva and Pittsburg, (2) a substantial portion of the traffic moves in unit trains controlled by USS, (3) USS's Pittsburg plant is served directly by ATSF and SN and is open to SP through ATSF, (4) USS's traffic allocation policy is based to a large degree upon equipment supplied, (5) UP, SP, WP and DRGW supply equipment to the USS pool, (6) originating traffic is handled approximately 50% by DRGW and 50% by UP, (7) approximately 70% of the total traffic is allocated to SP and (8) USS's practice is to switch trains into its plant once a day at 11:30 pm.

On cross examination, UP's traffic evaluator stated UP originated traffic would probably move via UP-WP (TR 2887, 2892). We agree with this assessment. We further believe that [741] it is in USS's interest to maintain a competitive alternative into the Bay Area. Accordingly we believe that DRGW originations will move predominately over SP. These reroutings will reduce SP's participation in this traffic from 70% to 50%, a loss of 28.57%. A loss of this magnitude will result in a loss to SP of approximately $3,738,529. The difference between this figure and SP's estimated loss ($9,814,130-$3,738,529=$6,075,601) represents an overstatement in diverted revenue and will be deducted from SP's total revenue loss.

TOFC/COFC

Applicants identified 106 TOFC/COFC shipments which they contend will not be diverted due to SP's use of unrealistic schedule assumptions, SP's ownership of shippers' freight facilities, shipper practice of routing landbridge/minibridge traffic over one routing and/or applicants' higher rates over the St. Louis gateway (Appendices III-D, II-F and II-H). These shipments moved in or through the following western corridors:

Central California	Shipments
Chicago - Bay Area	38
Memphis - San Francisco	8
St. Louis - Oakland	1
Southern California	
Memphis - Los Angeles	16
St. Louis - Los Angeles	8
Minibridge/Landbridge	
Los Angeles - Southern ports via New Orleans	22
Los Angeles - Eastern ports via St. Louis	5
W. Oakland - Southern ports via New Orleans	1
Oakland - Eastern ports via Chicago	5
Other	7

On brief, SP concedes that one movement will not be diverted and that two others would be diverted at lower percentages. These changes are included in SP's revised estimate.

The record shows that TOFC/COFC traffic is generally time-sensitive and generally routed over routes providing fast and reliable service. Other factors influencing routings include freight house location and ownership, ramp location and train cut-off and arrival time.

We have reviewed applicants' and SP's schedule assumptions and with minor exception believe them to be reasonable estimates. In addition we have reviewed the traffic bases of applicant and protestant railroads and find that many freight forwarders, shipper associations and shipper agents use multiple routings within single corridors. These multiple routings indicate to us (1) that while transit time is a factor in route selection, differences of a few hours may be immaterial and (2) that while freight house location and ownership is a factor in route selection, it may not be as significant as applicants would argue. Accordingly, we believe that applicants' service will be competitive with SP's between among others (1) Chicago and the Bay Area, (2) Memphis and the Bay Area, (3) St. Louis and the Bay Area, (4) St. Louis and Los Angeles and from Los Angeles to Memphis. Applicant's ability to provide a competitive service in these markets will in our opinion enable them to divert a portion of SP's TOFC traffic.

[742] As to SP's landbridge/minibridge traffic, the record shows that this traffic also moves over multiple routes within single corridors and that applicants rerouted this type of traffic via St. Louis in their own traffic studies. This evidence in our opinion weakens applicants' arguments that these shippers choose single routings and that rates would be higher via St. Louis. In addition we have examined potential service levels between Atlantic and Pacific ports and believe applicants will be able to pro-

vide competitive service for this traffic. In light of these factors, we believe applicants will be able to divert a portion of SP's landbridge/minibridge traffic.

There are a number of TOFC shipments, however, which we believe will not be diverted due to the influence of factors other than service. Four such shipments consist of three movements from Memphis to San Francisco routed SSW-Corsicana-SP and one shipment from St. Louis to Oakland routed the same way. In our opinion, the routings were not selected entirely because of transit time since SLSF-Avard-ATSF routings from Memphis to the Bay Area are nearly one day faster than present routings, and central corridor routings from St. Louis to Oakland are also faster than SP's southern corridor routings. Instead, the routings selected indicate to us a preference for SP which we believe would be unaffected by improvements in applicants' or other carriers' service. Accordingly, we believe SP will retain this traffic.

A fifth move consists of a shipment from Chicago to Oakland moving via BN-Denver-DRGW-Ogden-SP which SP diverted 50% to BN-Grand Island-UP-WP. SP's study movement sheet shows that DRGW enjoys a special relationship with the shipper or consignee which enabled it to influence the move over its line. In light of this relationship we believe applicants would not be successful in attracting this move to their system lines.

Among the major corridors in which we believe applicants will face a competitive disadvantage is Memphis to Los Angeles. Applicants identified 16 shipments moving within this corridor which SP diverted due primarily to applicants' new competitive service. The record shows that SP operates one of the fastest schedules from Memphis to Los Angeles, nearly one day faster than applicants' proposed schedule. Use of SP routings in lieu of alternative slower routings indicates to us a desire for expeditious service. In our opinion, applicants' longer schedule places them at a competitive disadvan-

tage which in light of present routing practices would make it difficult for them to attract this time-sensitive traffic. Expanded revenues for the 21 moves discussed above, $12,166,473, will be deducted from SP's estimated loss.

FMC Soda Ash

Applicants identified five soda ash movements which they contend will not be diverted due to SP's relationship with the shipper, FMC (Appendix III-E). On brief SP concedes that two of the movements will not be diverted and has included these changes in its revised diversion estimate. We agree with SP as to the other three.

Special Services

Applicants dispute 22 of SP's diversions due to use of special services (Appendix II-G). Thirteen of these movements have already been discussed. Of the remaining nine, SP concedes that six will not be diverted. Revenue changes for these are included in SP's revised diversion estimate. Of the remaining three, we agree with applicants in regard to two.

The first of these consists of a movement from Longview, TX to South San Francisco routed MP-El Paso-SP with a stop off at Los Angeles. SP argues that the move will be diverted to an MP-Kansas City-UP-WP routing due to applicants' single system capabilities, their ability to provide competitive service, and shipper location. In making its diversion, SP argues that the stop off should be ignored because the shipment moved [743] under a rate which did not apply. We are reluctant to ignore the present stop off in light of evidence suggesting the movement could have moved with a stop off under a different albeit higher rate. Absent evidence that a higher rate would alter the shipper's desire for

stop off privileges, we believe SP would not lose this traffic to applicants' single system.

The second shipment consists of a transit shipment moving in a private covered hopper car from Corpus Christi, TX to Warm Springs, CA routed SP-Stockton-WP. SP diverted the move to MP-UP-WP due to applicants' single system service, the consignee's location at a closed WP point and the shipper's support of the primary application. SP acknowledges that in general, transit will hold a movement to its current routing (TR 5021). In light of this practice, SP's present long haul participation and the 1,000 mile circuity of the proposed routing, we believe SP will retain this traffic. Expanded revenues for the two shipments, $445,495, will be deducted from SP's revenue loss.

Circuity

Applicants identified 12 shipments which they contend will not be diverted due to the circuity of the diverted route (Appendix II-E). Eight of these have already been discussed and one other will be discussed under facility substitution. Of the remaining three, the first consists of a movement of hazardous materials in a private tank car from El Dorado, AR to a closed SP point at Dominquez, CA routed MP-El Paso-SP. SP diverted the shipment to MP-Kansas City-UP-Colton-SP due to applicants' ability to provide competitive service. On cross-examination SP states the circuity of this diversion to be approximately 200 miles; applicants believe it closer to 700 miles. Our check of mileages reveals that applicants' figure is the more accurate. It is our experience that private car owners are generally interested in expedited service except during times of car surpluses; the routing selected is a direct service route reflecting that general concern. Due to the additional mileage the diverted route would entail and the fact that no interchanges are eliminated, we believe the proposed

routing could substantially increase transit times and thereby render the proposed routing unacceptable.

The second shipment consists of a movement of pulpboard from Springhill, LA to Buena Park, CA routed LA-Dallas-MP-El Paso-SP. SP diverted the move to LA-Dallas-MP-Kansas City-UP Los Angeles-SP due to use of MP assigned special equipment. The study movement sheet shows that the shipment originated and terminated at closed LA and SP points, respectively.

The selection of the present three-carrier route (LA-MP-SP) instead of available two-carrier routes (LA-SP) indicates a recognition of the serving carriers as well as the carrier owning the equipment. In light of alternative routings which could have given one of the participating carriers a longer haul, it appears that none of the carriers was uniquely favored. In our opinion, this offsetting influence of serving carrier versus equipment ownership makes it unlikely that SP would be short-hauled via a California junction on future moves.

The final shipment consists of a TOFC plan 2 movement from Longview, TX to South San Francisco routed MP-El Paso-SP. SP diverted the shipment to applicants' single system due to their ability to provide competitive single system service and consignor location. As we have mentioned, shippers using TOFC service generally select service routes providing fast, reliable transit. The present route fits this criteria. By our calculation, the reroute is nearly 900 miles longer than the existing route. Despite the elimination of an interchange, we believe the additional transit time required to travel these added miles would make it difficult for applicants to successfully solicit their single system haul. Accordingly, we believe SP will continue to participate in this traffic. Expanded revenues for the three moves, $679,808, will be deducted from SP's revenue loss estimate.

[744]

Equipment/Facility Substitution

Applicants identified 50 shipments which they contend will not be diverted due to the equipment used and another 34 which they contend will not be diverted due to the present facilities used (Appendix II-D). Of these 84 shipments all but 13 have been discussed. SP concedes that six of the 13 will not be diverted and has incorporated these changes in its revised diversion estimate. Of the remaining seven, two consist of movements from Miller Brewing in Ft. Worth to Stockton routed MP-El Paso-SP and from Philip Morris in Louisville to Oakland routed ICG-Memphis-SLSF-Kansas City-UP-SP. SSW assigned special equipment was used in both instances. SP diverted the first via MP-UP-WP due to shipper location, applicants' ability to provide single system service and applicants' ability to provide faster or more direct service. SP diverted the second via ICG-Memphis-SLSF-Kansas City-UP-WP due to fewer carriers in the route, applicants' faster or more direct service, equipment and the consignor's allocation of traffic policy. The record shows that the equipment used for these moves is used promiscuously and hence does not directly dictate the routing. The record also shows that routings of Miller Brewing and Philip Morris are based in part upon equipment furnished and that single line routings from Ft. Worth and Memphis were available at the time of these moves but were not used. While we acknowledge that assignments do change, we find nothing in the record that convinces us that SP would be asked to reduce its assignments especially since these shippers did not make use of single line or more direct routings that were available. For these reasons, we believe SP will continue to participate in this traffic.

A third movement consists of a shipment from Kimwood, OR to Friendship, NC routed SP-New Orleans-SOU. SP rerouted the movement to a three-carrier SP-Ogden-UP-MP-Memphis-SOU routing due to applicants'

ability to provide competitive service and their relationship with the shipper, Weyerhaeuser. The shipment moved in an SP plain boxcar, from an SP closed point over SP's long haul southern route. In our opinion, SP's ability to obtain its long haul southern corridor routing in lieu of competitive central corridor routings indicates sufficient influence to prevent diversions via Ogden in the future.

Three additional movements consist of barite shipments from Beowawe, NV to Houston and from Battle Mountain, NV to Brownsville, TX routed SP. Each moved in an SP open hopper car. SP diverted each to WP-UP-MP due to applicants' ability to provide competitive single system service, shipper routing and policies and applicants' faster or more direct service. It has been our experience that shippers often favor carriers supplying them equipment. The present routings which start in north central Nevada, travel west to central California, south through California and then east to destination are circuitous, indicating that they may well have been chosen because of SP equipment. We find nothing in the record to suggest that SP will be unable to supply this equipment in the future. Accordingly, we believe SP will continue to participate in this traffic.

The final shipment consists of a movement of automobiles from Houston to Denver routed SP-Ft. Worth-FWD-CS-Pueblo-DRGW. SP diverted the movement to MP-Kansas City-UP due to applicants' faster or more direct service and their single line capabilities. The record shows that this shipment moved from a closed SP point to a closed DRGW point; that MP and UP have auto loading and unloading facilities in Houston and Denver, respectively; that the shipment was a one-time move and that the carrier furnishing equipment received a haul. On cross examination, SP's traffic evaluator stated that SP was able to supply equipment for the move (TR 4894). There is no indication whether MP

which presently provides two-line service to Denver, or any other carrier, including ATSF which provides single line service between Houston and Denver, was able to provide equipment. Absent this information, we are reluctant to agree with SP's diversion. Expanded revenues for the seven moves, $3,259,463, will be deducted from SP's revenue loss.

[745]

SP Long Haul Routings

Applicants identified 11 shipments which they contend will not be diverted because SP's diversions are inconsistent with the factors that governed their particular routings in 1979 (Appendix II-C). Six of these movements have already been discussed. The remaining five consist of three movements from Pennsylvania to central California, one from Indiana to central California, and one from central California to Quebec. Two of the Pennsylvania and the Quebec moves are to or from closed SP points while the other two moves are to SP points open to WP. Applicants presently do not participate in any of the routings as each is routed between California and E. St. Louis via SP's long haul southern corridor route. SP diverted this portion of the routing to either applicants' single system overland route or to a SP routing via a California or Ogden junction due to applicants' competitive service, applicants' faster or more direct service and/or use of applicants' special equipment.

The record shows that each of the movements except the one from Indiana lie outside CP Conditions territory, thereby allowing SP to solicit movement via its long haul southern corridor routing. Use of its southern corridor Corsicana route in lieu of more direct overland routes indicates that SP has been able to successfully influence these routings. In light of this ability, we believe SP should be able to retain this traffic. For the last move,

lying within CP Conditions territory, SPT is required to solicit movement via Ogden. Use of its southern corridor haul in this instance indicates either the shipper's desire to favor SP or SSW's successful ability to influence the routing. Either or both of these possibilities should be sufficient to prevent diversion to applicants' consolidated system. Expanded revenues for the five moves, $1,704,885, will be deducted from SP's revenue loss.

Routing Influence

Applicants argue that SP incorrectly diverted 59 shipments by disregarding the relative routing influence of originating, terminating and bridge carriers (Appendix II-B). Thirty six of these shipments have already been discussed. Of the remaining 23, we agree with applicants in regard to seven. Of these, five consist of movements between central California on the one hand and points in Florida, Iowa, Illinois, and Mississippi on the other. For each movement SP received its Ogden haul and UP participated as an overhead carrier. SP diverted each to an SP-California junction routing due to among others: allocation of traffic policies, applicants' relationship with the shipper or use of applicants' equipment. Generally, it has been our experience that originating and terminating carriers are able to influence routings to a greater degree than bridge carriers. Regarding these moves, SP exclusively serves each of the California shippers/receivers. This service gives SP a certain degree of influence which in our opinion is reflected in its receipt of an Ogden haul—a haul many shippers consider an SP long haul. Because applicants will not gain entry to these plants following consolidation, it is our opinion that the influence SP enjoys as sole originating or terminating carrier should be sufficient to offset any additional influence UP might gain from consolidation. We therefore believe it is unlikely that SP will be shorthauled in future routings

due to this transaction. Expanded revenues for these moves, $935,888, will be deducted from SP's revenue loss.

The final two shipments consist of movements from Inland Molasses in Dubuque, IA to Foster Farms in Livingston, CA and from Ethyl Corp. in Baton Rouge, LA to Perc-Service in Ookland. On brief, SP concedes that these movements will not be diverted and has revised its revenue diversion estimate accordingly.

Routing Policies

Applicants identified 147 shipments which they contend will not be diverted due to the routing policy of the shipper or receiver controlling the movement (Appendix II-A). One [746] hundred thirty eight (138) of these shipments have already been discussed. Of the remaining nine we agree with applicants regarding two. These shipments consist of a movement of synthetic plastics in a private covered hopper car from Cities Service at Texas City, TX to South Gate, CA routed MP-El Paso-SP and a shipment from Vulcan materials at Wichita, KS to Newark, CA routed MP-Pueblo-DRGW-Ogden-SP. SP diverted the first movement to a MP-Kansas City-UP routing due to applicants' ability to provide competitive single system service and shipper location. The record shows that SP could have handled this move in single line service, that the diverted route is approximately 1,100 miles longer than the existing route and that these cars are generally stored on leased tracks of which MP has several in the area. SP is unable to confirm that this car was stored prior to movement. In light of SP's single line capabilities, we agree that MP was favored. Nevertheless, the present route is only slightly longer than SP's route reflecting what we have mentioned previously—that private car owners generally desire expedited service. In light of this direct routing, we believe MP, even with its present influence, would be unsuccessful in soliciting a route over a 1,000 miles longer. Accordingly,

we will deduct $383,214 from SP's revenue loss. SP concedes on brief that the second movement will not be diverted. Subtraction of expanded revenues for this movement are reflected in SP's revised revenue loss estimate.

Miscellaneous Shipments

Applicants identified 28 shipments which they argue will not be diverted for various reasons (Appendix III-F). We agree with applicants regarding eight of these shipments. Three of the eight consist of movements of hazardous materials in privately owned tank cars. Of these three, two are from Texas/Louisiana Gulf points to Central California routed MP-El Paso-SP and ICG-New Orleans-SP respectively, while the third is from the Texas Gulf to southern California routed MP-El Paso-SP. SP diverted each to applicants' overland route due to shipper location, applicants' single line capabilities and/or applicants' ability to provide competitive service. As we have mentioned, it has been our experience that shippers using private equipment generally choose routings providing fast turnaround time except during times of car surpluses. The routings selected here are direct and expeditious. The reroutings proposed are between 400 and 1,100 miles longer than the present routings which in our opinion would make them unacceptable to these service sensitive shippers. Expanded revenues of $1,256,368 will therefore be deducted from SP's revenue loss.

Two additional shipments consist of movements from Mayfield, KY and Lincoln, NE to SP closed points in California. Present routings consist of ICG-Memphis-SSW-SP and MP-Pueblo-DRGW-Ogden-SP, respectively. SP diverted the first to ICG-Memphis-MP-UP-Colton-SP due to use of a WP unequipped boxcar and applicants' faster or more direct service and the second to MP-DRGW-WP-SP due to applicants' relation with the shipper. Regarding the first move, the present routing indicates SP is able to exercise a certain degree of influence

in that it received its present long haul consistent with service. This influence, stemming most likely from its exclusive service to the point of destination, should in our opinion be sufficient to offset attempts by applicants to be included and receive a substantial haul as an over head carrier due to the use of its equipment. Regarding the second move, we believe SP received its central corridor long-haul due to its exclusive service to the point of destinations and that DRGW was included due to use of its special equipment. SP's proposed routings adds an additional carrier and interchange to the route which in our experience is something shippers generally avoid for service reasons. For this reason and the influence SP has as the sole terminating carrier, we do not believe SP will be shorthauled on future movements. Expanded revenues of $355,398 will be subtracted from SP's revenue loss.

[747] Two additional shipments consist of movements from Grand Rapids, MI and Port Gardner, LA to closed SP points in the California Bay Area. Present routings consist of CR-Chicago-BN-Denver-DRGW-Ogden-SP and LA-New Orleans-ICG-Shreveport-SP, respectively. SP diverted the first to CR-BN-Denver-UP-WP-Stockton-SP due to use of WP special equipment and the second to LA-ICG-Memphis MP-UP-Ogden-SP due to applicants' ability to provide competitive service. Regarding the first move, we note that WP, the owner of the equipment, and UP, which participates in routes competitive with the one selected, were not included in the present routing. As such we conclude that the influence of the terminating carrier in this case was greater than the influence stemming from equipment ownership and that the influence of other central corridor carriers was greater than UP's. Accordingly, we believe the consignor's desire to favor the terminating carrier and carriers other than UP will preclude SP shorthauls on future movements. Regarding the second move, it is our opinion that the selection of a

three carrier, somewhat circuitous route instead of more direct two line service reflects recognition of ICG special equipment. ICG's participation is of a limited nature, however, as it could have carried the traffic to Memphis or Kansas City. ICG's shorthaul to Shreveport is in our opinion indicative of a certain degree of SP influence, stemming most likely from its exclusive service at the point of destination. In light of this existing influence we believe applicants would be unsuccessful as an overhead carrier in attracting this shipment. Expanded revenues for the two moves, $461,671, will be subtracted from SP's revenue loss.

The final shipment consists of a movement from Winston-Salem, NC to Vernon, CA routed SOU-Memphis-SSW-SP. SP concedes on brief that this shipment will not be diverted and has incorporated that change in its revised diversion estimate.

In summary, we find SP's estimate of revenue loss to be overstated. Our analysis shows that of the movements initially diverted by SP, 106 will not be diverted and 51 will be diverted at a lower percentage (includes those conceded to on brief). By deducting expanded revenues for these movements ($50.7 million) from SP's estimated revenue loss ($105.2 million), we find that SP's traffic study supports an annual gross revenue loss of $54.5 million.

CARLOAD TO INTERMODAL DIVERSION STUDY

In addition to its traditional traffic diversion study, SP performed a carload to intermodal diversion study to estimate the amount of SPT carload traffic potentially divertible to applicant's TOFC service. Traffic studied consisted of movements contained in SP's traffic diversion study sample moving between Nevada and selected northern California sales office regions on the one hand and selected eastern and southern sales office regions on the other.

A total of 348 records with expanded revenues of $62.4 million were identified as moving between these regions.[2] Of these, the following movements were deemed non-divertible and excluded from further analysis: (1) movements in intermodal service, (2) movements utilizing special rail equipment moving a commodity that would be difficult to divert to intermodal service, (3) movements diverted to applicants' carload service in the SPT traffic study, (4) movements in UP, MP or WP cars, (5) movements of auto parts moving in specially equipped boxcars tailored to assembly plant layout and material handling requirements of receivers, (6) movements of hazardous materials moving in special cars and (7) transit shipments or shipments moving as a part of a block of cars under incentive battery rates. A total of 190 observations were excluded by these criteria, leaving 158 for [748] study. Of these, 13 were later excluded based on a limited survey which indicated that diversion would not be possible.

Divertibility judgments were based on application of a total logistics cost analysis model. In general, the model is a normative model of shipper choice which determines the least cost logistics strategy for an individual shipper under a given set of circumstances. Logistics strategies were described in terms of reorder points (the level of inventory at which an order is placed), reorder quantities (shipment size) and choices of transportation service (rail, carload or intermodal). Cost functions for each strategy were specified, after which a search was made of all combinations of shipment sizes, reorder points and types of transportation service to find the strategy with the lowest logistics cost. Data put in or developed included: annual traffic volumes terminated by SP for each commodity and receiver shown on the SMS, commodity attributes, transport mode and shipment size options

[2] Total competitive traffic between these regions was estimated to have revenues of $92.3 million.

available for each observation, transit times and freight rates.

The cost model was run for three scenarios: the 1979 pre-merger environment, the 1979 post-merger environment incorporating transit time improvements proposed by applicants for each gateway to northern California, and the 1979 post-merger environment with applicants transit time improvements and rate reductions of 10, 20, and 40 percent. Based on its belief that applicants would reduce their rates by 10 to 20 percent, SP estimated that it will lose between $10.5 million (10% reduction) and $17.9 million (20% reduction).

Applicants submitted no rebuttal testimony regarding the study nor did they address the study on brief.

During presentation of their case-in-chief, applicants testified there are certain circumstances in which they will attempt to divert carload traffic to their TOFC service. We agree with their testimony that applicants' TOFC directional imbalance will cause them to solicit competing carriers' carload traffic to their TOFC service. Furthermore, in light of applicants' intention to obtain every car they can (TR 694), we believe it is reasonable to assume that the experience gained in developing rate and service packages to divert motor carrier traffic will not be confined to motor carrier traffic but will be used to attract traffic from all other services including competing carriers' carload service.

In terms of rate reductions, applicants cite the low profit margins on TOFC traffic. In our opinion, these margins will limit the amount of reductions applicants would offer. Accordingly, we accept SP's 20% reduction as a reasonable maximum applicants would apply.

Regarding use of the logistics cost model, our concern is not whether an individual or computer model determines what diversions will occur, but whether they are

supportable. In general, we believe SP's witness offered in support of this study possessed sufficient knowledge of the model and of rail traffic to give credence to the study results. Through cross-examination however, applicants have persuaded us that SP's results are overstated due to inconsistencies in applying its divertibility criteria and failure to consider all divertibility factors. Our review of movements diverted by SP and cross-examined by applicants shows that SP diverted four carloads which should have been excluded from final analysis. These included one carload moving in an MP car, one in a UP car, one utilizing transit privileges and one already diverted to applicants' carload service. Had SP eliminated these movements from analysis, losses at the 20% reduction level would have been reduced by $1.3 million.

Second, while logistics cost is an important factor in modal and carrier choice, we do not believe that it is always the sole determinant. In this regard, SP surveyed shippers of 24 movements which the model indicated should be currently using TOFC service instead of carload service and found that for 13 movements, carload service was the only appropriate method of shipment. In discussing its surveys, SP testified that there are reasons why the model would predict one decision while the shipper was making another (TR 11392). SP [749] also testified that the possibility exists that had it surveyed additional firms, it would have found additional receivers who felt they could not use intermodal service (TR 11391). We agree with this assessment, particularly in light of our experience that for some shippers, factors in addition to cost (i.e., shipper/carrier relationship, maintenance of competitive alternatives) influence modal and carrier choice.

Two movements worth $1.3 million in expanded revenues which we believe fall into this category and hence will not be diverted to applicants' intermodal service are movements from Sunnyvale, CA to Lemoyne, PA routed

SP-El Paso-MP-Roscoe-RSP-Snyder-ATSF-CR and from Shawinigan, PO to San Jose, CA routed SP-Sumas-BN-Klamath Falls-SP. Study movement sheets for these movements show that RSP and BN respectively have special relationships with the industries involved. We believe the routings are indicative of these relationships in that for the RSP move: (1) more direct routes with fewer carriers in them could have been used and (2) three major western carriers including SP which exclusively serves the origin and provided special equipment were shorthauled in order for RSP to be used. For the BN move, we note that SP, the sole terminating carrier, was shorthauled in favor of BN, an overhead carrier. In light of the clear favoritism shown RSP and BN, we believe applicants would have difficulty in attracting these moves to their TOFC service.

By reducing SP's results by expanded revenues for the six moves, we find that SP's study supports a carload to intermodal revenue loss at a 20% rate reduction level of $15.3 million.

DOWNWARD SPIRAL ANALYSIS

Of the 105.2 million SP estimates it would lose to the new UP system, SP estimates that $80.3 million are losses from its central corridor gathering area (i.e., Oregon, northern California and Nevada). SP estimates the avoidable costs of handling this lost traffic to be $27.1 million, leaving a shortfall of $53.2 million, which it claims must be offset to maintain its financial viability. SP proposes as offsetting measures reductions in plant, increases in rates and reductions in service. SP argues these latter two measures would result in additional traffic losses which lead to further rate increases or service reductions with the end result being a downward

spiral of traffic loss and rate increases or service reductions.

Reductions in plant: SP argues that due to its traffic losses, through traffic moving over its Modac Subdivision would be more economically moved via Roseville. Accordingly, SP would abandon its Modac Subdivision between Klamath Falls and Weso and its Lakeview and Susanville branches which connect to the Modac Subdivision. SP estimates these abandonments would produce savings in maintenance and other expenses amounting to $652,000 annually with a one-time benefit of $11 million.

Increases in Rates: SP examined the potential for revenue increases due to imposition of joint rate surcharges and light density line surcharges. SP studied its potential assuming first no rerouting of current Ogden gateway traffic and second, total rerouting of Ogden gateway traffic to the Stockton gateway. Results of its analysis are shown below.

[750]

Revenue Increases Due to Surcharge
(million)

	Exclusive Points	Competitive Points	Total
		Stockton	
Joint-line Surcharges	$1.75	$1.11	$2.86
Light Density Line Surcharge	.47	.25	.72
Total	2.22	1.36	3.58
		Ogden	
Joint-line Surcharges	$2.22	$3.37	$5.60
Light Density Line Surcharge	1.17	.48	1.65
Total	3.39	3.85	7.25

SP argues that if it imposed joint rate surcharges, shippers would have an incentive to route their traffic

through Stockton since total freight charges would be lower. Similarly SP argues that at competitive points, if it were the only carrier imposing surcharges, shippers would immediately divert their traffic to the nonsurcharging carrier. Accordingly, SP argues that its ability to impose surcharges is restricted to traffic to/from exclusive SP points moving through Stockton. Revenues associated with surcharges on this traffic total $2.2 million.

SP argues that it is unlikely that these rate increases will benefit it in the long run since rate increases could drive certain customers out of existing markets and would create incentives for customers to relocate on other lines. Thus, SP claims a downward spiral would begin as it will have to increase rates or curtail services yet again to recoup these losses.

Reductions in Service: SP estimates that by operating its trains on a full tonnage basis it can reduce its road freight train miles in its central corridor gathering area by 32% (34% after avoidable miles). Because a major part of train yard switch crew work relates to the number of trains assembled and switched, SP reduced train yard switch crews by the same percentage. Savings associated with these reductions total $24.8 and $6.8 million respectively, leaving a shortfall of $21.6 million. SP argues the only means available to offset this shortfall is to curtail local gathering services in the central corridor gathering area by 60%.

SP sales managers analyzed the customer impact and potential losses based on the proposed service cuts (Diversion II analysis). The analysis was performed on a major customer-specific basis for each line segment and projected traffic losses were identified based on whether the customer was exclusively served and whether the traffic flowed through the Ogden gateway. Results of

SP's Diversion II analysis less losses found in its opposition study (Diversion I analysis) are shown below:

[751]

	Diversion II losses	Diversion I losses	Total losses
	(millions)	*(millions)*	*(millions)*
Central Corridor Gathering area	$380.3	$80.2	$300.1

Source Exhibit 25 (revised), SPT-44.

SP argues that these actions would begin a never-ending downward spiral as revenue losses would lead to further service reductions which would again lead to further revenue losses.

Applicants argue that it is irrational and unlikely that SP would offset $21 million in losses by making service cuts which would result in additional losses of $300 million. Moreover, applicants argue that SP will not be faced with the prospect of reducing local services since it can fully offset its $105 million loss by other means. Specifically, applicants contend that SP has understated its ability to reduce costs associated with its traffic diversions and has ignored more modest systemwide changes in through train size and associated yard starts that would fully compensate for the portion of its projected diversion losses not offset by direct cost reductions.

In response, SP argues that spreading its central corridor gathering area losses over the entire SP system would be in conflict with the fundamental policy and goals of the 4-R Act and Staggers Act,[3] that spreading its losses over the entire SP system would impair remaining profit centers and that SP is unable to absorb its losses due to its slim profit margins.

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[3] Railroad Revitalization and Regulatory Reform Act, Pub. L. No. 94-210, 90 Stat. 31 (1976) and Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980).

SP's Chief Executive Officer testified that SP's Diversion II analysis is a response to the Commission's February 24, 1981 order and does not reflect what SP may or may not have to do to offset its revenue losses (TR 4116)[4] SP's Chief Executive Officer testified further that it is highly unlikely that SP would be able to cut its services because of the demands of its customers (TR 4117). In light of this testimony which reflects SP's awareness of its responsibility toward its shippers, and our belief that SP's responsibility toward its stockholders makes it unlikely that it would implement steps that would lose $300 million while trying to save $21 million, we find the actions underlying SP's Diversion II results unsupported and deserving no weight.

Notwithstanding the unlikelihood of SP's massive local service reduction, however, we believe SP will not need to take such drastic actions to offset its losses. Our analysis of SP's traffic diversion study shows that SP will lose approximately $42.5 million in revenue from Oregon, Nevada and northern California and not the $80.3 million it estimates. Furthermore, applicants persuade us that SP has understated its costs associated with handling its lost traffic. Our recalculation of SP's costs associated with through freight operations, yard operations and maintenance of way shows an understatement by SP of $5.6 million. Similarly, we believe SP has understated its costs associated with car hire but we are unable to recalculate these for the central corridor gathering area. Adjusting for the understatements, we believe SP's costs of handling its lost traffic total $32.7 million. By reducing this figure by the same percentage SP's revenues were reduced (52.9%), we believe SP's net [752]

[4] The Commission's February 24, 1981 decision requested protestant carriers to address, among other things, why they will lose traffic in a given market due to the consolidation, whether they will remain competitive in that market, the steps they might take to compete effectively and why such efforts might not be effective.

revenue loss will total $25.2 million instead of SP's estimate of $53.2 million. Continuing with SP's methodology, recalculation of SP's savings associated with reductions in train miles and train yard crew starts show savings of $13.1 million and $3.6 million, respectively, leaving SP a shortfall of $8.5 million instead of $21.6 million.[5] In our opinion this is a significant reduction in SP's estimates.

While we applied SP's methodology to arrive at the above figure, we do not agree with SP that it must offset its shortfall by making adjustments solely within the central corridor gathering area. Even though the direction of Congress and the Commission is toward greater pricing freedom, individual rate adjustments and elimination of noncompensatory rates, we agree with applicants that a policy of strict cost allocation for rail services has not been established. Moreover, we believe that cost cutting measures that are narrowly implemented but ad-

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Central Corridor Gathering Area (CCGA)
(Dollars in Millions)

	SPT-45 App. V	ICC Restatement
Gross Rev. Loss	$80.3	1 $42.5
CCGA Avoidable Expenses		
thru-Frt & yard	4.6	4.7
Fuel	6.3	6.3
M of W & E	6.0	11.5
Car Hire	8.3	8.3
Other	1.9	1.9
Total	27.1	32.7
Adjusted Avoidable Expenses		2 17.3
Net Rev. Loss	53.2	25.2
Additional Savings		
Thru Train Miles	24.8	3 13.1
Yard Crew Starts	6.8	3.6
Revenue Lost	21.6	8.5

1 52.9 percent of Column 1.

2 52.9 percent of $32.7 million.

versely affect systemwide operations and viability would be contrary to sound business practices as well as the goals of the Staggers Act and the National Rail Transportation Policy. Should SP therefore decide to offset its losses on a systemwide basis, we believe as applicants have shown that SP's adjustments would be much more modest than what SP proposes and would not entail any reductions in local service.[6] While it is the responsibility of SP's management ultimately to decide what adjustments to make, we believe the record shows there are options available to SP that would not so drastically affect its shippers or its viability as the downward spiral scenario proposed by SP.

[753] APPENDIX G

Trackage Rights-Pooling Traffic Analysis

MISSOURI-KANSAS-TEXAS

MKT conducted traffic diversion studies to determine the additional traffic that it would gain by the acquisition of trackage rights over the lines of UP and MP. Katy's first step was to obtain a new sample using about the same procedures, as well as the same 1979 data base, which was utilized in its opposition traffic study. This new sample consisted of 3,541 study movements. Once the movements were identified, study movement sheets (SMS) were prepared with copies of the waybills and abstracts attached. The same evaluation procedures used in its opposition study were utilized, with the exception that the evaluators applied percentages of either 100, 50, 25, 10 or zero percent to represent the amount of diversion. Of the 3,541 sample movements, MKT determined 160 movements to be divertible.

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[6] UP estimates that a 13.6% reduction in train miles and yard starts on a systemwide basis would result in savings of $38.2 million. Because our findings show SP's shortfall to be only $25.2 million, SP's adjustments would be even more modest.

The next step consisted of identifying the relevant and non-relevant traffic included in the traffic samples of UP, MP and WP in which MKT did not participate but which it believed might be subject to diversion if its trackage rights applications were granted. The relevant and non-relevant movements which MKT was interested in reviewing either originated, terminated or were interchanged at Corpus Christi and Laredo, TX; Omaha-Counci Bluffs, Topeka and Atchison, KS; and Lincoln, NE. Before MKT studied the non-relevant traffic in detail, it first reviewed applicants' computer runs to determine which movements were potentially divertible. Katy found 230 potentially divertible movements in the MP study and 14 movements in the UP study. For those movements, MKT requested applicants to furnish it with the waybills and abstracts. In many cases only abstracts were furnished, making it impossible for the evaluators to analyze such movements because no consignor and consignee were shown. Of the group of non-relevant movements, MKT determined that 92 would be divertible to it. With respect to the relevant movements, SMS were furnished by the applicants for 2,555 movements with the basic information shown, but as to another 1,749 movements there were 1,482 with no documents and no waybills or abstracts. Due to time constraints, Katy had no opportunity to request additional waybills and fully complete its study of these 1,482 movements. Therefore, the study of the total UP-MP traffic was not completed. Based upon the SMS with full information, Katy determined that only 70 movements (relevant) would be diverted to MKT.

In sum, Katy found that 160 movements in its sample and 162 movements in applicants' sample, or a total of 322 movements, would be diverted to MKT if all requested trackage rights were acquired. When expanded to the total volume for the year 1979, MKT would receive an

additional revenue gain of $9,544,951, based on sampled non-grain traffic.

In addition to making the above traffic studies which were based on actual movements and waybills, Katy made a market impact analysis of grain movements from the midwest cities it desires to serve. According to MKT, this was necessary because the grain export market has increased drastically and because Katy had insufficient time to complete a full study of all grain in the applicants' sample. To determine the total grain available for movement from areas where it is seeking trackage rights, MKT made a survey of the storage capacity of elevators in Omaha, Council Bluffs, Lincoln, Atchison and Topeka. The elevators at these northern terminals have a storage capacity of 124,325,000 bushels. In order to determine the estimated annual turnover or throughput of these elevators, MKT utilized a multiplier of 2.25 times the elevators' capacity. This resulted in an estimated annual volume of 279,700,000 bushels or the equivalent of about 82,000 carloads (3,400 bushels [754] per car) of grain in a normal year. MKT believes that it will be able to obtain a minimum of 10 percent (8,200 carloads) of this traffic. These 8,200 carloads would provide Katy with new revenues amounting to $20,833,560.

The gains in grain traffic are in addition to the gains in other non-grain traffic shown in MKT's traffic study based on its and applicants' sample movements. Any gains of grain movements from the sample studies were excluded in order to avoid duplication. Combining the gains from the grain and non-grain studies shows that MKT stands to gain $30,378,511 in gross annual revenues. The table below shows the revenue gains for the individual and combined trackage rights studies. In evaluating these results, it should be noted that some diversions appear under both Laredo and Corpus Christi and some diversions occur only in the combined study, if all trackage rights requests would be granted.

	Grain	Non-Grain	Total
Kansas City—Omaha/Council Bluffs	$ 9,497,070	$ 795,735	10,292,805
Kansas City—Topeka	5,772,690	73,950	5,846,640
San Antonio—Corpus Christi	1,861,200	4,799,796	6,660,996
San Antonio—Laredo	0	8,096,196	8,096,196
Combined Study	$20,833,560	$9,544,951	$30,378,511

Applicants assert that MKT's estmates [sic] are erroneous, do not conform to our prescribed methodology for such studies, contain numerous factual and arithmetic errors, and are entitled to no weight. Applicants charge that MKT's potential revenue gain will approximate $60 to $70 million rather than the $30 million Katy has estimated.

Non-grain traffic—Applicants claim that MKT's estimated non-grain traffic gain of $9.5 million is understated and that a more realistic figure would be substantially higher than $13.0 million. Applicants point out that MKT did not review 1,500 (actually 1,482) movements in UP-MP's sample which had been pre-screened by Katy and identified as potentially susceptibe to diversion. According to applicants, there is no basis for concluding that diversions in the 1,500 movement group would be any less frequent than in the group of 2,800 movements that was reviewed. Thus, applicants increased Katy's estimate of $7.5 million, derived from the UP-MP sample, to $11.2 million by mathematical computation ($7.5 multiplied by 1.5). Applicants state that this illustrates that Katy's $9.5 million non-grain estimate is understated by at least $3.7 million. MKT argues that applicants' expansion of its non-grain revenue estimate is conjecture in that applicants made no study in rebuttal, offered no other evidence of any kind and did not cross-examine Katy's traffic evaluators as to the individual movements. We are of the opinion that MKT's non-grain estimated gain may be understated. However, without any evidence to rebut MKT's conclusions prov-

ing the estimate is either correct or understated, we find the $9.5 million estimate to be reasonable.

Grain traffic—Applicants contend that the $20.8 million gain in revenues projected by MKT in grain traffic is significantly understated. According to applicants, MKT stands to gain $43.7 million to $64.6 million in revenue from additional grain traffic if its trackage rights applications are approved. Applicants believe that MKT will draw grain from locations beyond the trackage rights terminal points, such as northwestern Kansas, and that the storage capacity estimates that MKT relied upon reflect only a portion of the total grain market.

The applicants argue that the annual storage capacity at elevators in the locations examined by MKT was substantially understated. While Katy utilized a multiplier of 2.25 [755] times capacity in order to calculate annual turnover or throughput applicants assert that the average actual multiplier at the elevators for which MKT supplied data was over 5. Applicants contend that while MKT was unable to secure throughput or capacity data for several large elevators, the actual 1980 throughput of those elevators for which MKT was able secure such data was greater than MKT's assumptions for the annual throughput for the entire market. Applicants point out that the five elevators for which no information on annual turnover was supplied have storage capacity of 47 million bushels. According to applicants, had these volumes been included and multiplied by MKT's 2.25 multiplier, the capacity figure would have increased by 38 percent. Thus, applicants claim that even if all other aspects of Katy's study were correct, MKT's estimate in gains in grain traffic alone should be increased by at least 38 percent to $28.0 million.

Applicants state that MKT's prediction that it will capture only a 10 percent share of the market in the areas in which it would offer single-line service seems

understated in light of MKT's historical performance. Applicants point out that MKT grain carloads for export through Houston and Galveston in 1979 and 1980 represented 16 and 24 percent of total grain exports through those two ports. Using MKT's total market estimates of 82,000 carloads of available grain and applying MKT's revenue and traffic flow assumptions, applicants calculate that a 16 percent share of the market would result in revenue gains of $32.2 million, while a 24 percent share would show a $47.3 million revenue gain. If MKT's total market estimate is adjusted to correct for the absence of throughput information at major elevators discussed above, applicants claim that a 16 and 24 percent share of the market would produce gains in revenue amounting to $43.7 million and $64.6 million respectively.

On brief, MKT's attacks applicants assertion that Katy would capture more than 10 percent of the grain available at Omaha-Council Bluffs, Lincoln, Atchison and Topeka. MKT argues that a 10 percent market share is a reasonable assumption when the competition from UP, MP, BN and ATSF is considered. The inconsistent applicant asserts that the percent of total grain exports that terminate at Houston and Galveston cannot be used to determine a market share at origin points. Katy maintains that the amount of grain it will obtain will be determined by what is available in the origin area and the shipper's choice of routes—not what arrives at the destination from several different origins.

We agree with MKT that a 10 percent share of the grain market is a reasonable expectation. The applicants, BN and/or ATSF already have established single-line routes to Houston and Galveston from the origins which Katy is seeking to serve. For several years, these carriers have been working closely with the grain shippers in those areas. This fact alone will make it difficult for Katy to break into the market. In addition, the applicants, BN and ATSF have the ability to offer competitive

rates to the West Coast, which Katy will not be able to offer. Katy's work papers, which were introduced into evidence by the applicants, indicate the existence of substantial grain movements to the West Coast from Omaha and Lincoln, NE. In our opinion, MKT will be fortunate if it is able to obtain a 10 percent share of the grain market in Omaha-Council Bluffs, Lincoln, Atchison and Topeka.

As for Katy's estimate of the annual storage capacity at the elevators in the locations examined by MKT, we agree with applicants that this estimate is understated. However, we do not agree with applicants' method of increasing the storage capacity by 38 percent. Applicants are in error when they contend that the five elevators with storage capacity of 47 million bushels were not included in MKT's annual capacity estimate. These five elevators contributed 106.2 million bushels to MKT's annual capacity estimate of 279.2 million bushels.

We are of the opinion that MKT's understatement is due to its very conservative 2.25 elevator turn factor. Applicants pointed out that the average actual multiplier at the eighteen elevators for which MKT had data was over 5. However, we calculated the weighted [756] average turn factor for these elevators and arrived at 3.7 turns. The evidence shows that Katy's Assistant Vice President of the Central Region, who is the grain and grain traffic expert at MKT, recommended that a 2.5 turnover factor be used to calculate the annual storage capacity for all the elevators. The evidence further indicates that large elevators have less turnover than smaller elevators. Thus, the weighted average turnover would tend to be lower than 3.7 if the actual data from the large elevators were included. In our opinion, a more reasonable turn factor to be used in estimating the annual storage capacity would be 3.

MKT's grain market impact study shows the basic capacity of the elevators in Omaha-Council Bluffs, Lincoln,

Atchison and Topeka to be 124.3 million bushels. Using the turn factor 3, the total annual storage capacity of these elevators would be 372.9 million bushels. This annual capacity converts to 109,676 carloads (3,400 bushels per car) compared to MKT's estimate of 82,274 carloads. Therefore, we find that MKT's annual storage capacity is understated by 33 percent and that its estimated gain in grain revenues should be increased by one-third. The table below reflects this finding.

	Grain	Non-Grain	Total
Kansas City—Omaha/Council Bluffs	$12,631,103	$ 795,735	$13,426,838
Kansas City—Topeka	7,677,677	73,950	7,751,627
San Antonio—Corpus Christi	2,475,396	4,799,796	7,275,192
San Antonio—Laredo		8,096,196	8,096,196
Combined Study	$27,708,634	$9,544,951	$37,253,585

DRGW

In support of its trackage rights request, DRGW submitted a traffic study showing the traffic and revenue impact if the UP-MP-WP consolidation were approved and DRGW received trackage rights over MP between Pueblo and Kansas City. In estimating this impact, DRGW studied the same sample of 1979 DRGW traffic used for its opposition traffic study and those movements in applicants' traffic diversion sample geographically relevant to DRWG's trackage rights requests not routed via DRGW. Designs for these samples are discussed in those portions of this decision dealing with DRGW's opposition traffic study and applicants' traffic study respectively. DRGW's Assistant Vice President-Sales evaluated each movement using generally the same procedures, assumptions and diversion factors used in DRGW's opposition traffic study. Following evaluation, changes in revenues were calculated for each diverted movement. Results of the study show that DRGW would stand to gain gross revenues amounting to $40,053,913.

The table below shows the gross revenue impacts on carriers participating in these proceedings as a result of the common

[757]

	UP-MP-WP merger DRGW to Kansas City
ATSF 1	$(4,289,945)
BN 2	(7,221,308)
CNW	1,514,918
CR	(114,244)
ICG	593,170
KCS 3	49,899
MILW	1,523,672
MKT	4,898
MP	(48,745,335)
SP 4	(3,266,823)
UP	35,589,855 [5]
WP 6	(4,411,292)

1 Includes TPW.

2 Includes CS, FWD, SLSF, OE.

3 Includes L&A.

4 Includes SSW, NWP.

5 $29.0 million is revenues gained from DRGW as a result of UP-MP-WP consolidation.

6 Includes SN, TS.

control of UP-MP-WP, assuming the DRGW is granted trackage rights over the MP between Pueblo and Kansas City, according to DRGW.

The only railroad party to attack DRGW's trackage rights traffic study was ATSF. That carrier claims that DRGW's traffic study substantially understated the financial impact upon ATSF, and presented four reasons why it did so. First, DRGW failed to study any ATSF local traffic or ATSF traffic interlined with railroads other than DRGW or the primary applicants. Second, DRGW's evaluation approach permitting only a decision of "no change" or "100 percent diversion" led DRGW to fail to identify diversions that would occur only part of the time.

Third, DRGW's traffic study did not consider the effect of its ability to interline traffic at Kansas City with carriers other than ATSF for movement to Chicago. Fourth, DRGW's traffic study did not divert from ATSF any DRGW originated unit coal traffic where DRGW would be likely to attempt to extend its haul on coal shipments now interchanged with ATSF at Pueblo.

We agree with ATSF that DRGW's trackage rights traffic study understates to a degree the losses which ATSF may experience if we approve this application. However, we cannot criticize DRGW for not studying ATSF traffic when that data was not available to DRGW at the time it made its study. As for the percent of diversion approach utilized by DRGW, we find this approach acceptable as discussed in our analysis of the primary applicants' traffic study. The other two shortcomings pointed out by ATSF are basically differences of opinion between the two parties. In our opinion, the results of DRGW's traffic study are a good indication as to the *minimum* amount of revenue DRGW will gain from its requested trackage rights over MP from Pueblo, CO to Kansas City, MO.

Because ATSF thought that DRGW's traffic study understated the impact on ATSF, the protestant decided to study that portion of its traffic which was believed to be most affected by this trackage rights proposal. In its view, the primary effect of an expanded DRGW system extending from the San Francisco Bay area to Kansas City would be, in addition to traffic already handled by DRGW, the diversion of a portion of the traffic ATSF handles either locally or in interline service between the northeast and northern California. The [758] protestant identified all sample movements in its opposition traffic study which were handled between the northeast and northern California, as previously defined. Of the 700 study movements that fell into this category, ATSF found 242 to be divertible. The movements that ATSF judged to

be divertible were included in three general groups: (1) between Chicago and northern California; (2) between the northeast (other than Chicago) and northern California via either a Chicago or Streator interchange; and (3) between the northeast (other than Chicago) and northern California via a Kansas City interchange.

ATSF believes that its traffic moving between Chicago and northern California will be diverted primarily because DRGW would be able to offer new single-line service between northern California and Chicago in connection with carrier providing service between Kansas City and Chicago such as BN, CNW, Milwaukee Road and ICG. The total diversion ATSF anticipates from this group amounts to $4,466,087, most of which would come from TOFC business. In addition, ATSF claims that it will lose a total of $890,768 because of DRGW's new entry into Kansas City and the use of its connections east of Kansas City to divert ATSF traffic moving between northern California and the northeast (other than Chicago) via Chicago or Streator. Furthermore, ATSF estimates that it will lose $944,287 from its traffic moving between northern California and the northeast (other than Chicago) because of DRGW's new ability to connect with the N&W system at Kansas City. Consequently, ATSF believes that it will lose gross revenues of $6.3 million from diversions of non-coal movements in addition to the $4.3 million estimated by DRGW. Thus, ATSF claims that its minimum annual gross revenue losses to the DRGW proposed extended system excluding coal would be $10.6 million (in 1979 dollars).

In addition to the non-coal revenue losses, ATSF believes that DRGW's trackage rights may cause ATSF to lose two coal movements in which it participates with DRGW over ATSF's Pueblo-Kansas City line. The protestant feels that DRGW will try to obtain its long haul to Kansas City on these movements and that DRGW's influence as the originating carrier at the mine

may enable it to achieve its long haul. ATSF conservatively estimates that it will retain the Central Illinois Light Company movement and that there is a 50 percent chance that it will lose the overhead coal it carriers [sic] between Pueblo and Joliet, IL as part of the Northern Indiana Public Service Co. (NIPSCO) coal movement. If ATSF is eliminated from the NIPSCO coal movement, it claims that it will lose $10.1 million annually. Summarizing, ATSF argues that if all of its anticipated revenue losses as a result of the DRGW proposal are taken together, it stands to lose a minimum of $20.7 million (in 1979 dollars).

DRGW does not dispute any of the non-coal movements which ATSF diverted to the proposed new system. However, we have reservations about ATSF's use of the phrase "*minimum* annual gross revenue losses". The study which ATSF conducted was based upon the assumption that DRGW would have single-line service from northern California to Kansas City. This will not be the case because the trackage rights DRGW is now seeking only extends its system to Kansas City and does not include rights over WP.

As for the unit train coal movement to NIPSCO, we do not believe that this traffic will be diverted from ATSF. The record shows that ATSF has made substantial capital investments in locomotives and cabooses in order to handle this coal movement. In addition, ATSF provides excellent overhead service for this movement. Furthermore, the record indicates that NIPSCO does the routing of this traffic rather than the mine operators as ATSF suggests. Finally, the evidence discloses that when a shipper selects a route for a volume coal movement and the carriers involved have committed certain capital expenditures to the movement, the shipper is not likely to change the routing for the term of the coal contract. In light of the above, we find that ATSF will continue to

handle the NIPSCO traffic and has overstated its revenue loss by $10.1 million. In sum, we conclude that ATSF may experience a maximum annual gross revenue of $10.6 million (in 1979 dollars) if DRGW's trackage rights request is approved.

[759] SP

SP conducted two traffic studies to determine the traffic and revenue impacts resulting from its full service trackage rights. The first, a waybill study of its own traffic, estimated the amount of traffic SP could divert and either bridge across UP on the one hand or originate or terminate on UP on the other. Sampling and evaluation procedures were similar to those used in SP's opposition study and are discussed in our traffic study appendix *supra*. The second, a market analysis, estimated the amount of traffic presently handled by UP but not SP which would be diverted to SP. SP's approach was to identify relevant UP traffic, group this traffic into market segments, estimate SP market share for each segment and compute SP annual revenue, carload and tonnage gains based on traffic levels and market share. Combined results of the two studies show SP gaining $100.4 million per year in gross revenues and $16.6 million in net revenues.

SP determined the revenue impact resulting from its bridge rights over UP by restudying all SPT-UP movements originating or terminating between Ogden and Omaha, Council Bluffs, Gibbon or Topeka that were diverted in its full service rights study. Because SP pickup and delivery service would not be provided, SP deemed each of these nondivertible and deducted their revenue, carload and cost totals from their full service rights results. For similar reasons, SP also deducted its market analysis totals. SP estimates it would gain $65.5 million in gross revenues from its UP bridge rights and $14.5 million in net revenues.

In determining the impact of its Kansas City-St.Louis rights, SP relied on the results of its opposition traffic study ($105.2 million gross loss). SP used these results because its opposition study assumed consummation of the UP-MP-WP consolidations and SP operations between Kansas City and St. Louis. Additionally, SP contends it makes no difference to its shippers whether SP operates over the MP or former RI; hence a grant of rights over MP would not change its opposition study results. Applicants did not address SP's trackage rights traffic studies on brief and only minimally cross-examined SP's traffic study witnesses.

DRGW, as part of its opposition, conducted a traffic study of its own to determine the impact of SP trackage rights over UP on its traffic and revenues. DRGW's traffic sample and divertibility factors were the same as those used for DRGW's opposition study and are described in our traffic study appendix *supra*. Movements diverted to the new UP system as part of its opposition study were not evaluated in determining DRGW's loss to SP, thus making DRGW's losses to SP in addition to its losses to the new UP. Results of DRGW's study are as follows:

Gross Revenue loss (000)	$17,751
Cost of Handling Lost Traffic (000)	13,092
Net Revenue Loss (000)	4,659

SP argues that DRGW has overstated its losses to SP by neglecting to account for shipper allocation of traffic among carriers, shipper loyalty to DRGW, car ownership, origin/destination carrier influence, car service directives, multiple shipments, roller movements, factors influencing present routings and UP's ability to divert traffic. By reevaluating each movement diverted by DRGW, SP argues that DRGW's study supports a gross revenue loss to SP of $7.1 million and a net loss of $1.8 million.

Regarding SP's full service trackage rights over UP, we have examined SP's study movement sheets filed in conjunction with its traffic study. Based on the information contained on these sheets, we believe SP's diversion judgments are for the most part reasonable and supportable. Similarly, we have reviewed SP's methodology for estimating [760] revenue gains from traffic handled by UP but not by SP. We agree with SP that in light of UP's efficient service and established relationships, SP will have difficulty making large inroads into UP's traffic base. Accordingly, we accept SP's estimate of $100.4 million in revenues gained as reasonable.

Regarding SP's bridge rights over UP, we believe SP's methodology for estimating its revenue gains (full service rights gains less revenues from diverted movements originating or terminating on the subject UP lines) is reasonable. Accordingly, we accept SP's estimate of $65.5 million.

Regarding SP's trackage rights over MP, we believe that in light of SP's service assumptions, it would make little difference to shippers whether SP operates over a rehabilitated RI line or MP's line. Since SP assumed in its opposition traffic study a fully rehabilitated RI line, we accept SP's contention that granting trackage rights over MP would not change its opposition study results.

Regarding DRGW's study, we have reviewed SP's reevaluation of diverted movements and are persuaded that DRGW has overstated its losses. Examples of movements which we believe will not be diverted include: an eastbound movement from California to Minnesota routed SP-Ogden-DRGW-Denver-UP-MILW (SMS-L-66); a westbound move from Iowa to California routed CNW-UP-Denver-DRGW-Ogden-SP (SMS-M-3) and two movements from Illinois to California routed BN-Denver-DRGW-Ogden-SP (SMS L-108 and SMS M-145). In our opinion, the first two movements show a clear favoring of DRGW since, UP was shorthauled and use of DRGW

adds an additional carrier to the routing. We believe this favoritism would make it difficult for SP to attract these moves to its extended line. The latter two moves in our opinion reflect the influence of the originating carrier, as BN received its long haul. We believe it is unlikely that BN would be shorthauled on future moves in order to give SP, the terminating carrier, an extended haul. In light of our decision to deny SP's trackage rights over UP for operational reasons, however, we believe a full analysis of DRGW's study is not required.

CNW SETTLEMENT AND POOLING AGREEMENT

MKT Traffic Study

MKT prepared a traffic study to determine what additional revenue impact approval of the UP-MP-CNW settlement agreement would have on it. The study is based on a probability sample. The sample was obtained from a population including all movements covered by settlement dates in 1979, both local and interline. The movements were stratified by class of traffic and then separated as to whether CNW was in the route-of-movement, with special attention to all MKT-CNW direct interchange at Kansas City. This resulted in 14 strata. Seven of the strata involve the CNW, including four which represent direct Kansas City interchange. The sampling plan developed called for a two percent sample of pertinent strata, with a minimum of 30 movements in any one strata. The final study sample size was 458 records.

Study Movement Sheets (SMS) were prepared for the 458 records and together with the waybills and abstracts were sent to MKT's traffic officers for use in their evaluations. In making its study, MKT considered the many factors which influence shippers' routing of cars and choice of carriers. MKT utilized eleven reasons or tests to determine whether each movement in the study would

be diverted as a result of the settlement agreement. The two most important reasons for diversions listed by MKT were: (1) loss to UP/MP due to the CNW pooling agreement—MP will have access to train manifests and can determine the origins, destinations, shippers and consignees on cars in pooling agreement trains [761] and (2) loss to UP/MP due to prospective UP leverage resulting from UP dominance and CNW cooperation with UP/MP. In every case MKT used only 100 percent diversion or no diversion. Of the 458 sample movements evaluated, MKT found 251 to be divertible. The revenue loss attributable to these 251 sample movements amounted to $9,319,999.

ATSF Impact Study

In order to estimate the probable effect upon ATSF from the proposed new relationship between CNW and the applicants on north-south traffic, ATSF studied 1980 CNW-ATSF traffic interchanged at Kansas City. As a preliminary step, ATSF examined a listing of all CNW-ATSF traffic which had been captured in its 15,500 movement traffic sample drawn to provide data for ATSF's opposition traffic study. This examination suggested that most of the traffic likely to be influenced by the proposed CNW-UP pooling agreement and closer north-south relationship was grain originating on CNW in Minnesota and Iowa, interchanged to ATSF at Kansas City, and handled by ATSF to Texas destinations.

After deciding to measure only grain traffic, ATSF generated a complete listing of all Iowa/Minnesota corn and soybean traffic handled to Texas destinations in 1980. After studying these data, ATSF made a further listing of all 1980 CNW-originated corn and soybean traffic handled to Texas Gulf ports, Rio Grande crossings, and competitive MP-ATSF destinations in Texas. This final listing consisted of the following: shipper, origin city/state, rail car initials, destination city/state, number of carloads, and settled ATSF revenue. In the aggregate,

this 1980 CNW-ATSF grain traffic amounted to 10,192 carloads and $10,342,601 in ATSF revenues. This block of grain traffic was deemed to be susceptible to diversion from ATSF as a result of the pooling agreement and the associated close working relationship between CNW and applicants on north-south traffic.

ATSF analyzed the impact of this relationship on a movement-specific basis in order to determine how much of this traffic probably would be diverted to new CNW-UP routings. The protestant utilized the following assumptions in determining the impact on its revenues. (1) CNW-UP marketing efforts and cooperation on interline rail operations would divert at least 25 percent of all traffic moving from CNW origins in private, shipper-owned equipment. (2) CNW-UP marketing efforts and cooperation on interline rail operations would divert at least 50 percent of all traffic moving from CNW origins in CNW or RI marked equipment (since CNW has purchased a substantial amount of RI equipment). (3) CNW-UP would be able to substitute UP equipment for that of ATSF at least 80 percent of the time, and 100 percent of those shipments would be routed via CNW-UP. (4) CNW-UP solicitation efforts and cooperation on interline rail operations would divert at least 25 percent of all traffic still moving in equipment of other railroads to the CNW-UP route via Kansas City.

Application of these assumptions to the CNW-ATSF 1980 grain traffic data base resulted in a $4,056,548 revenue loss for ATSF. The protestant adjusted this revenue loss to reflect 1981 revenues. The consequence of this adjustment indicates a revenue loss of $3.7 million.

KCS Impact Study

KCS conducted a study of its grain traffic in order to determine the effects that the CNW pooling agreement would have upon its revenues. Based upon computer printouts, KCS determined that it received 7,900 car-

loads of corn and soybeans in 1979 and about 12,900 carloads in 1980 from CNW and Rock Island. This traffic originated in Iowa, Minnesota and Nebraska and was delivered by KCS for export at competitive ports served by KCS and MP.

[762] The protestant believes that it may lose all of this grain traffic because of the *de facto* control of UP over CNW and the substantial solicitation and operating advantages MP would have over its competitors. Each of the cars involved represented rail revenues of approximately $810 and $1,025 in 1979 and 1980, respectively. Thus, KCS concluded that it could lose a maximum of 12,900 cars or approximately $13 million in 1980 revenues if the pooling agreement is approved.

Milwaukee Impact Study

Milwaukee re-examined its traffic study work papers in order to calculate additional revenue losses to CNW as a result of Milwaukee's lack of competitive rates and routes on traffic which would be diverted to CNW. Milwaukee apparently assumed that because of the UP-CNW agreement, CNW will have rates and routes with the applicants whereas Milwaukee will not. The protestant points out that it serves more midwestern stations in common with CNW than any other carrier. In the states of Iowa, Illinois, Minnesota, Missouri, South Dakota, and Wisconsin over 80 stations are served jointly by Milwaukee and CNW. Virtually all industries at those stations are open to reciprocal switching and Milwaukee and CNW compete for any traffic moving to or from those stations, interchanged with UP or MP. Milwaukee and CNW also compete for bridge traffic interchanged with applicants moving to or from official territory. Thirteen of the top fifteen commodities handled by Milwaukee and CNW are contained in the top fifteen categories of the other carrier. Hence, according to the protestant, Milwaukee and CNW are head-to-head com-

petitors for similar traffic interchanged with applicants, originating or terminating in the midwest or bridged between the Missouri River and Chicago. Milwaukee's review of its worksheets resulted in an additional gross revenue loss of $2.21 million if it is not protected by competitive rates and routes via Kansas City for the future.

Discussion and Conclusions

The studies of KCS and MKT are primarily based upon the assumptions that UP has control or leverage over CNW and that the pooling arrangement gives MP solicitation and operating advantages over its competitors. The ATSF study rested on the belief that the pooling agreement will provide a closer working relationship between applicants and CNW and thus weaken ATSF's ability to compete for north-south traffic moving through Kansas City. The Milwaukee study was based upon the assumption that the CNW-UP agreement assures that CNW will have rates and routes with the applicants, whereas, Milwaukee will not.

From a traffic stand point, it appears that little weight can be given to the assumption that UP has substantial leverage or control over CNW. Seventy-three percent of CNW traffic involves movements with carriers other than the UP. In 1979, CNW and UP interchanged 357,903 carloads. Of this total, UP delivered approximately 56 percent of the cars (200,200) to CNW. The interchange between these two railroads at Fremont, the nation's single largest interchange point, accounted for about 79 percent (281,843 cars) of the total CNW-UP interchange. Fifty-two percent of this traffic at Fremont was delivered by CNW to UP. Thus, it can be concluded that UP is as dependent upon CNW for east-west traffic at Fremont as CNW is on UP. After the consolidation, UP-MP will have the opportunity to divert some of this traffic away from the Fremont gateway to the St. Louis gateway. However, this is precisely what the traffic and

operating conditions set forth in the settlement agreement are suppose to negate.

[763] The pooling agreement will not give MP any substantial solicitation or operating advantages over its competitors. The primary purpose of the pooling agreement is to remove circuity. The traffic which will be moving in this service is essentially the traffic which originates or terminates in western Iowa, Minnesota, South Dakota, North Dakota, Nebraska and Wyoming (excluding coal originating in Wyoming) and now moves via CNW through Des Moines to Kansas City. The evidence shows that the CNW intends for this operation to be completely neutral and not to favor any carrier. The pooling agreement calls for the CNW to provide the locomotive power, fuel and cabooses that are required for the operation of the trains, while MP will furnish the train and engine crews. According to the record, the trains will originate at CNW yards in Council Bluffs and Kansas City, where switching and interchange operations will be conducted as they are today. The degree to which any of CNW's Kansas City connecting carriers participate in this traffic will be a reflection on their service and willingness to join with CNW in competitively pricing the traffic. It will not be the result of the pooling agreement.

The protestants argue that MP will be able to delay CNW trains destined for interchange with other Kansas City connections and expedite trains destined for interchange with MP. This will result from MP having control over the dispatching and handling to the trains. We disagree. CNW will be able to police the transit times because it will know when a train leaves its Omaha yard and when it arrives at Kansas City. Thus, CNW will know whether the transit time is unreasonably long and whether MP is trying to discriminate in the handling of CNW trains. If this occurs, CNW can seek enforcement of Section I. 3 of the pooling agreement which expressly

provides that MP shall handle CNW trains without discrimination and without giving preference to MP trains.

Certain parties expressed concern that MP solicitation efforts will be enhanced by disclosure of information concerning the traffic moving in the pooled service. We do not find this to be the case. All of the traffic ATSF and KCS diverted was export grain, while 80 percent of MKT's losses were attributable to grain traffic. The record clearly shows that for large grain shippers, the principal shippers in this market, this information is already available to experienced traffic solicitors through their ordinary marketing practices. In addition, the evidence indicates that CNW will furnish MP only abbreviated train consists which will not disclose any information, such as the destination and identity of the consignee, that may aid MP in soliciting the traffic. At the same time, these shipping documents will be adequate to alert MP of any hazardous materials in a train moving in pooled service, and all information required by law to be furnished to MP crews will be provided in sealed envelopes, to be opened only in the event of an accident. Finally, protestants' arguments that MP will not be able to verify that all traffic handled in the pooled service is from the appropriate CNW origins, unless MP has the full train consist, is without merit. Section II. 7 of the pooling agreement provides that the records of each party must be open to inspection. The parties will be able to make arrangements for MP to conduct an audit of CNW's records under appropriate safeguards in order to ensure that the pooled traffic originates or terminates at CNW stations in the states designated in the agreement.

Milwaukee's diversion estimate was based upon the assumption that it will not have rates and routes with the applicants via Kansas City, whereas CNW will be assured of continued competitive rates and routes with applicants via Freemont-Omaha. All of the revenue

losses projected by Milwaukee were from traffic interchanged with UP at Kansas City. Milwaukee's traffic evaluator identified all traffic moving via UP from or to points served jointly by CNW and Milwaukee and presumed that 100 percent of that traffic would be diverted. Individual movements were not analyzed. In our opinion, Milwaukee's study only identified the traffic which may be susceptible to possible diversion. Its conclusion that all of this susceptible traffic will be diverted is not supported by the record. At least 60 [764] percent of Milwaukee's diversion is attributable to a long-standing truck-rail movement of Chrysler traffic to and from Chicago and Minneapolis. Milwaukee provides the necessary marshalling yard and loading ramps for the movement of this setup auto traffic. Another movement which accounted for a substantial portion of Milwaukee's losses originated at a Proctor and Gamble facility in Green Bay, WI. This facility is served by Milwaukee, CNW and the Green Bay & Western RR. The evidence indicates that Proctor and Gamble allocates its traffic among competing carriers on the basis of car supply. Large industrial shippers, such as Chrysler and Proctor and Gamble, are immune from rail carrier efforts to alter routing practices. Their traffic provides such good revenues to rail carriers that they control the routing, not the carrier. These shippers are well-positioned to demand competitive rates and routes from the railroads. Since Milwaukee has been providing the necessary services which these shippers require, we find it unlikely that this traffic will be rerouted via CNW. The cross-examination of Milwaukee's evaluator revealed that other traffic (TOFC and beer) included in the study has little possibility of being rerouted as well. We conclude that little, if any, weight can be given to Milwaukee's study. It is obvious that the $2.21 million revenue loss projected by Milwaukee is substantially overstated and of little value.

In sum, we conclude that none of the protesting railroads will be adversely affected by the CNW settlement and pooling agreement.

APPENDIX H

Cost and Benefit Analysis

I. CONCLUSION

Applicants' calculation of net benefits arising from the consolidation are accepted. A summary of those benefits is shown in Attachment B. Protestants generally focused their opposition to the proposals on evidence directed at applicants' traffic diversion studies and not the net benefits derived from the consolidation. Traffic diversion will be addressed in a subsequent analysis. Data reflecting diversions are shown in Attachment B.

II. INTRODUCTION

In support of the application, applicants' introduced evidence purporting to demonstrate changes in revenues arising from traffic diversion from other railroads and in costs realizable through consolidation of facilities and utilization of shorter operating distances. Protestant railroads introduced evidence regarding their anticipated revenue losses and saveable costs related to consolidation-induced traffic diversion. On rebuttal applicants disputed protestants' projections of both revenues and saveable costs used to derive then forecasted net income reductions.

III. APPLICANTS' DIRECT EVIDENCE

A. *Applicants' Direct Evidence*

Applicants' conducted a study supported by the testimony and verified statements of numerous witnesses, measuring the economic benefits (savings) arising from

the implementation of the operating plan. Certain alterations in the existing patterns of service impact upon these benefits. The net economic benefit derived from combining the results of the individual studies of separate functions is described below.

[765]

1. *Consolidation of Main Line Operations*

No consolidation of UP/MP main line operations is proposed by applicants. However, traffic will be pooled between Omaha/Council Bluffs and Kansas City; Beloit and Salina, KS; Lincoln, NE and Kansas City; Frankfort, KS and Kansas City and between Topeka, KS and Kansas City. Some MP traffic will be rerouted on different MP lines south and east of Kansas City to take maximum advantage of line capacities.

Additionally, no consolidation of main line operations is proposed between UP and WP. However, operating functions will be consolidated at Salt Lake City. WP is not involved in any main line consolidation nor will its inclusion in this consolidation affect UP-MP routings.

2. *Blocking Plan*

The results of applicants' Rail Traffic Diversion Study and the Non-Rail Traffic Diversion Study were combined with the most recent car flow data to determine the new blocking requirements necessary to handle both base and incremental traffic. Particular attention was given to building run through trains that could operate a maximum distance before having to set out traffic short of the distribution terminal.

3. *Anticipated Workload of System Classification Yards*

The anticipated incremental traffic volume resulting from consolidation will necessitate 4,302 additional cars per day to serve the 50 terminals located on the consolidated UP-MP system. An estimated 1,182 additional

cars per day will move through the combined UP/MP yards in Kansas City. This represents approximately 27 percent of the total additional terminal area traffic. The list below outlines the 14 terminals expected to handle an additional 100 cars or more per day as a result of the merger.

TABLE 1

1.	Kansas City, MO-KS (UP Cars)	844
2.	St. Louis, MO	454
3.	Salt Lake City, UT	390
4.	Kansas City MO-KS (MP Cars)	338
5.	Green River, WY	325
6.	North Platte, NE	307
7.	Topeka, KS	291
8.	Ogden, UT	289
9.	Marysville, KS	287
10.	Newport, AR	154
11.	Atchison, KS	287
12.	Coffeyville, KS	119
13.	Memphis, TN	106
14.	Muskogee, OK	105
	Total of 14 Terminals	4154 cars/day

The inclusion of the WP into the merged system will also increase traffic volumes at various terminal facilities. With the inclusion of the WP, an additional 1,500 cars per day will move through 31 terminals impacted by consolidation. Eight of the 31 terminals will realize an increase of at least 100 cars per day moved through their terminal area.

[766]

TABLE 2

1.	Elko, NV	151
2.	Green River, WY	148
3.	Oroville, CA	147
4.	Sacramento, CA	145
5.	Salt Lake City, UT	145
6.	Ogden, UT	137
7.	Stockton, CA	127
8.	North Platte, NE	107
	Total of 8 Terminals	1107 cars/day

The increase in the cars per day in the above Table at Green River, WY, Salt Lake City, UT, Ogden, UT, and

North Platte, NE are in addition to those shown in the preceeding Table, which includes consolidation of the UP and MP and not the WP.

Applicants believe these changes in volume will not require any further changes in terminal operations beyond those already planned.

4. *Train Service*

The additional and/or changed traffic flows will permit the implementation of 24 new train operations resulting in improved service. Two additional new train operations will involve trainload movements of marine containers between North Platte, NE and St. Louis and Oakland. Additionally, eleven existing train schedules will be replaced with either new train schedules or improved through-train service. Seven train schedules will be discontinued, and service will be provided by other trains.

5. *Locomotive and Caboose Requirements*

Increased traffic volumes and additional train operations will require a total of 110 additional power units and 27 additional cabooses. These requirements have not been offset by locomotive unit savings at common points or increased locomotive availability resulting from improved access to repair facilities.

6. *Common Point Consolidations*

Thirteen common points are presently served by applicants. Twelve points are believed to be potentially capable of generating savings through consolidations. At one point, Frankfort, KS, no consolidation is anticipated and no savings are foreseen. The savings were determined by the use of guidelines which directed consolidation of specific work functions not obtainable without a merger of properties. The quality of present service was assumed

to be maintained. Calculation of the savings was predicated upon the forthcoming changes in operating practices with consideration given to equipment, facility, and personnel resources.

a. *Kansas City, KS-MO*

The UP operates two principal yards in the Kansas City area—the Armstrong Yard and the 18th Street Yard. Additionally, two main support yards, the North Yard and the Quindaro Yard, are located in the Fairfax Industrial District 3 miles north of the Armstrong Yard. MP's Neff Yard consists of two separate hump yards, the East and West Yards. MP also operates five industry support yards in Kansas City.

As a result of the consolidation, a combined Customer Service Center and Operations Control Center will be established at the Neff Yard. The consolidation according to applicants will increase the efficiency of the Kansas City facilities and provide more flexibility in the operation of the Kansas City area terminals.

[767] As a result of the Kansas City consolidation, 57 existing positions will be abolished and one transferred. The financial impact of this and other aspects of the Kansas City consolidation are outlined below.

	Annual Net Benefits	One-Time Benefits	One-Time Costs
Agency and Yard Office	$1,299,167		
Train and Engine Crew	131,286		
Locomotive		$488,000	
Computer Programming and Training			$ 120,000
Relocating Agency and Yard Office Forces to Neff Yard			440,093
Route Upgrading			$1,482,579
Other	103,889		
Total	$1,534,342	$488,000	$2,042,672

b. *Topeka, KS*

The Santa Fe serves as the intermediate switching carrier for traffic handled between UP and MP, which do not have direct interchange at Topeka. During 1979, UP originated or terminated 29,146 loaded cars at Topeka, while MP originated or terminated 3,738 carloads. UP and MP plan to establish a joint agency with UP performing the agency work. This consolidation will permit a reduction of one clerical position and the elimination of the MP depot.

	Annual Net Benefits
Agency Work Force Reduction	$35,574
Computer Equipment Reduction	18,000
Utilities	1,596
Total	$55,170

c. *St. Joseph, MO*

Presently, all UP switching is performed by the St. Joseph Terminal Railroad (STR) which is jointly owned by UP and Santa Fe. The STR performs switching in both St. Joseph, MO and across the river in the UP Elwood, KS Yard. After the consolidation MP will perform all its own switching in St. Joseph and it will perform all UP switching and mechanical work in the St. Joseph area except at Elwood, where the terminal railroad will continue to handle switching. MP will perform all St. Joseph station and agency work, including the work which would have been performed at Elwood. UP trains will operate into and out of the MP yard via a new connection from the UP Missouri River Bridge to MP trackage. Direct UP operation into the MP yard will permit UP cars destined to industries located on MP in St. Joseph to be delivered approximately 12 hours earlier than at present. Traffic at Elwood will be switched by the terminal railroad's crews with the clerical and ac-

counting functions being performed by MP. Benefits from the improved operations at this facility are shown below.

[768]

	Annual Net Benefits	One-Time Benefits	One-Time Costs
Terminal Maintenance and Operation	$568,673		
Construct Connection			$130,967
Other	(882)	$8,200	11,142
Total	$567,851	$8,200	$142,109

d. *Hiawatha, KS*

The UP Hiawatha clerical station work will be relocated to the MP Atchison Customer Service Center and the Hiawatha agent's position will be abolished. The UP depot at Hiawatha will be vacated.

	Annual Net Benefits
Agency Work Force Reduction	$24,688
Other	1,619
Total	$26,307

e. *Salina, KS*

MP will lease a locomotive unit from UP on a horsepower-hour basis and release the present MP locomotive for other use. This will permit the elimination of the MP mechanical foreman's position. The MP crew will operate out of the UP yard and handle interchange cars between the UP and MP yards. To facilitate this movement, a new connection will be constructed between the UP McPherson Branch and the MP line. MP's Salina agent and yard office work will be handled by present UP forces and the MP positions will be eliminated.

	Annual Net Benefits	One-Time Benefits	One-Time Costs
Agency Force Reduction	$ 93,549		
Locomotive		$552,715	
Construct Connection			$48,078
Retire MP Depot	6,130	29,171	
Eliminate MP Computer Equipment	13,357		
Other	13,718		
Total	$126,754	$581,886	$48,078

f. *McPherson, KS*

The MP depot will be retired and the MP agent will move into the UP depot. A joint agency will be established and the UP agent's position will be abolished.

[769]

	Annual Net Benefits	One-Time Benefits
Agency Work Force Reduction	$25,336	
Retire Depot	2,767	$15,000
Total	$28,103	$15,000

g. *Beloit, KS*

MP will handle all UP agency work for Beloit south to and including Minneapolis, KS, from its Concordia customer service center. UP will continue to handle all agency work from Solomon north to but excluding Minneapolis, KS from its Solomon agency. The UP mobile agent's position at Beloit will be eliminated. The volume of traffic moving via Beloit is anticipated to increase as a result of the pooling arrangement between Beloit and Salina. This arrangement will provide a significantly shorter route for grain moving from MP served areas of

northern Kansas to elevators in the Salina-Hutchinson-Wichita area.

	Annual Net Benefits	One-Time Benefits	One-Time Costs
Agency Work Force Reduction	$26,690		
Other	558	$5,000	$1,000
Total	$27,248	$5,000	$1,000

h. *Kanopolis, KS*

The MP clerical station work will be handled by the UP agent. The MP depot will be retired, and the MP agent's position will be eliminated.

	Annual Net Benefits
Agency Force Reduction	$21,400
Other	1,787
Total	$23,187

i. *Hastings, NE*

MP clerical station work will be handled by the present UP force. The MP depot will be retired and the MP agent's position will be eliminated.

[770]

	Annual Net Benefits	One-Time Benefits
Agency Work Force Reduction	$24,156	
Retire Depot	3,517	$13,398
Total	$27,673	$13,398

j. *Omaha, NE/Council Bluffs, IA*

MP's Omaha facilities consist of three sub-yards, Nicholas Street, Grace Street and the South Omaha

Yards. The primary commodity handled by MP in the area is grain; UP is its major connection.

The proposed operation calls for the UP to operate the Omaha-Council Bluffs terminal under a joint facility agreement between the two carriers. Reassignment of switching assignments will result in a savings of 24 switch engine shifts per week. MP will acquire trackage rights between Omaha and Council Bluffs. A portion of the Omaha facilities will be retired.

The proposed consolidation will improve car utilization by eliminating multiple handling of cars. Interchange between MP and most other railroads will be expedited, as all cars will be interchanged at Council Bluffs.

	Annual Net Benefits	One-Time Benefits	One-Time Costs
Clerical Force Reduction	$515,881		
Switch Engine Assignment Reductions	470,516		
Reduction of Other Personnel	499,746		
Locomotives		$ 970,000	
Release Computer Equipment	$5,232	164,300	
Other	138,687		$24,093
Total	$1,659,562	$1,134,300	$24,093

k. *Lincoln-Weeping Water, NE*

UP will operate the Lincoln terminal under a joint facility agreement between the two carriers. MP will abolish its Lincoln switch engine and the Lincoln-Union turn.

	Annual Net Benefits	One-Time Benefits
Agency Work Force Reduction	$ 30,555	
Switch Engine Local Train Reduction	102,784	
Locomotives Other	12,299	$1,106,000
Total	$145,638	$1,106,000

Institution of new methods of handling freight originating and terminating at Lincoln coupled with the elimination of other local trains will create additional savings.

[771]

1. *Omaha-Kansas City Corridor*

UP traffic for Kansas City and points south that originates east of Grand Island and moves via Valley, and Omaha-Council Bluffs area UP and MP traffic, will be routed to Council Bluffs for classification. UP and MP traffic will be pooled. MP Council Bluffs-Kansas City trains will handle the pooled traffic utilizing the MP Omaha Subdivision route to Kansas City and beyond. This route is 106 miles shorter between Omaha and Kansas City than the present UP route via Valley and Marysville. Use of this route will result in reduced car miles and fuel consumption, as well as reduced transit time. One scheduled train per day in each direction will be added to this MP route. All existing Council Bluffs-Kansas City scheduled trains will be abolished on the present UP route. UP will add one train per day in each direction between Council Bluffs and Marysville to handle additional traffic and provide local service. This change in train operations will result in an annual reduction of approximately 49,000 train miles, and will reduce transit time for cars by eliminating the need for reclassification at Kansas City.

To provide faster, more efficient service and improved equipment utilization, other pooling arrangements are planned. These arrangements provide for pooling of traffic between Lincoln and Kansas City, Frankfort and Kansas City and Topeka and Kansas City. The pooling will result in reduced transit times, generally shorter operating mileages and increased operating flexibility.

The financial impact of the Omaha-Kansas City route coordination is shown later in this analysis under the dis-

cussion of equipment utilization benefits due to changes in operations.

m. *Salt Lake City, UT*

UP's Salt Lake City terminal consists of two primary yards, the North and South Yards. UP also has a TOFC facility (Becks Ramp), auto unloading facility, locomotive repair facility and a one-spot light bad order freight car repair shop in Salt Lake City.

WP owns no significant terminal facilities in the Salt Lake City area. Instead terminal services are provided by DRGW at its Roper Yard through a joint facility agreement and by UP on UP/WP run through trains. In addition to handling carload switching, DRGW provides WP with TOFC/COFC, auto unloading, and car and locomotive repair services. In 1979, DRGW charged WP $3,089,300 under the Roper Yard agreement.

The proposed operation calls for a joint facility agreement between UP and WP covering consolidation of many of WP's terminal activities into UP's Salt Lake City terminals. WP will still retain the Roper Yard joint facility agreement with DRGW. Certain other terminal functions will be coordinated between the involved carriers. Movement of WP operations will cause a shift of 140 cars per day from Roper Yard to North Yard. Since many of DRGW's terminal services are charged on a per car handled basis, WP's decreased use of the Roper Yard will result in sizeable net annual savings. Traffic through the UP Salt Lake City terminal is expected to increase from the current 1,737 cars per day (472 requiring switching) to 2,041 (563 requiring switching). To handle these additional cars and to provide additional switching at the Becks TOFC Ramp, one additional switch engine shift and an additional ramp crew will be required. Four additional run through trains per day will be interchanged between UP and WP.

	Annual Net Benefits
Transfer Operations from Roper Yard Joint Facility	
Payments	$671,213
Switch Engine Cost	(183,331)
Transfer TOFC to Becks Ramp	
Lift Charges	235,110
Additional Ramp Crew	(107,875)
Other	(5,275)
Total	$609,842

7. *Terminal Upgrading and Modifications at Non-Common Points*

At non-common MP points, only the 23rd Street/12th Street Yard in St. Louis will require modifications. Running tracks around the perimeter of the yard will be created at an estimated cost of $1,457,000. No terminal upgrading or modification will be required at WP points.

8. *Management Information Systems*

Both UP and MP currently operate information systems with compatible computer hardware, software, programming languages and application systems. Also, both railroads presently support computer systems for financial, accounting and statistical analyses. In a combined system, minimum effort and cost will be required to produce these analyses.

With a one-time programming cost of $185,300 and the implementation of a data communication link between Omaha and St. Louis at an estimated one-time cost of $4,000, UP and MP information systems will be capable of facilitating single-system service.

WP central computer systems are not compatible with those of UP and MP. Thus the WP computer workload will be absorbed by the UP and MP at a one-time cost of $1,976,164. Annual recurring savings excluding labor

starting with the third year following consolidation are estimated at $507,424. Annual recurring labor savings are $1,158,064.

9. *Communications*

UP and MP's communications networks are presently connected. However, the existing communications facilities between UP and MP in Kansas City will be expanded with the installation of a microwave link at a one-time cost of $40,000. The inclusion of WP will necessitate a one-time expenditure of $190,018 for the acquisition and installation of communication equipment compatible with that of UP and MP.

10. *Coordination of Shops and Repair Facilities*

Applicants can realize savings by combining the production capacities of their shops and by internalizing selected mechanical functions currently performed by outside contractors. In total, these coordinations will result in annual savings of $12,375,850, one-time savings of $5,725,551 and one-time costs of $130,000.

Attachment A summarizes by station the annual net benefits, one-time benefits and one-time costs that are applicable to the coordination of shop and repair facilities.

11. *Maintenance of Way Coordination*

UP and MP maintenance of way operations will continue to function separately after the consummation of the proposed consolidation.

Although no major change in inspection policy is anticipated, some increase in inspection intervals may be necessary on those corridors which will realize volume increases as a result of traffic diversion. In the area of materials, savings can be derived through the coordinated use of ballast sources, tie-treating contracts and special-

ized equipment. These coordinations result in annual savings of $549,319.

[773] WP's maintenance of way operations will be organized and operated as a district of UP. The use of UP facilities to eliminate current WP outside contract work, the utilization of specialized equipment and the reorganization of engineering staff functions will result in annual savings of $965,029.

12. *Equipment Utilization*

Under common control, improvements in equipment utilization can be realized in four areas: 1) greater utilization of combined fleet capacity to better meet seasonal demand; 2) reduced empty cross-haul movements; 3) efficiencies resulting from consolidated operations; and 4) improved access to shop facilities for equipment repair.

The consolidated UP/MP system could have handled 1979 business in 2,872 fewer cars having a replacement value of $118,885,000. At the 17.9 percent cost of capital as determined by the ICC in Ex Parte No. 363, *Adequacy of Railroad Revenue (1979 Determination)*, this value is equivalent to an annual savings of $21,280,000. In addition, three fewer locomotive units with a replacement value of $2,100,000 would be required. The reduction in operating costs associated with more efficient use of equipment made possible by common system control is $1,561,000 annually.

With WP included, the system could have carried 1979 traffic in 3,368 fewer cars value at $139,741,000. At the same cost of capital rate used above, an annual savings of $22,014,000 would be realized. In addition, the UP-MP-WP system would have required eight fewer locomotive units valued at $5,140,000. The corresponding reduction in operating expense associated with these improvements is $2,077,000 annually.

a. *Use of Combined Capacity to Meet Seasonal Demand*

Under common control, the required freight moving capacity of UP, MP and WP will be a function of the aggregate peak demand for equipment throughout the combined system. This aggregate demand is in many cases lower than the sum of the peak demands on each individual road because demand on the separate roads may peak at different times.

As a result of cross-utilization of equipment by the UP-MP system, 2,388 fewer cars with a replacement value of $97,522,000 would have been needed to carry 1979 traffic had the merged system been in operation at that time.

With WP included, the number of cars not needed would have increased to 2,857 with replacement value of $116,855,000. In addition, savings of $437,000 per year will be achieved through substitution of idle Union Pacific Fruit Express equipment for Fruit Growers Express equipment on WP.

b. *Reductions in Empty Cross-Hauls*

Instances of foreign empties enroute home being cross-hauled against empty home-road cars enroute to loading areas are common. Under common control, some wasteful cross-hauling within the consolidated system can be eliminated by treating all system equipment as a single pool.

For the combined UP-MP system, the reduction in empty movements will reduce car miles by approximately 5,104,000 annually which translates to gross ton mile reductions of 177,708,000 and lower operating costs of approximately $889,000 per year. These savings in empty car days can be translated into the equivalent of 62 cars, with a corresponding value of $2,847,000.

A UP-MP-WP system would realize annual reductions of 7,435,000 empty car miles, 258,000,000 gross ton miles

with corresponding operating costs of approximately $1,314,000 per year. These savings in empty car days are equivalent to 89 cars valued at $3,997,000.

c. *Improvements Due to Changes in Operations*

Changes in operations will result in better handling of equipment and improvements in equipment utilization. Improvement in utilization benefits resulting from operational changes are shown in Table 3 below.

[774]

TABLE 3

Equipment Utilization Benefits Due to Changes in Operations UPRR-MPRR

	Value of Equipment Savings	Operating Cost	Car Hire Savings
Internal Reroutes			
UPRR	$ 744,000	($847,000/Yr.)	$ 109,000/Yr.
MPRR	12,271,000	255,000/Yr.	1,186,000/Yr.
Terminal Operations			
St. Joseph, MO	109,000		
Council Bluffs, IA	1,805,000		59,000/Yr.
Changes in Blocking and Train Operations			
Via Kansas City	3,902,000		144,000/Yr.
Total	18,831,000	(592,000/Yr.)	1,498,000/Yr.

Equipment Utilization Benefits Due to Changes in Operations UPRR-MPRR-WPRR

	Value of Equipment Savings	Operating Cost	Car Hire Savings
Internal Reroutes			
UPRR	$ 744,000	($847,000/Yr.)	$ 109,000/Yr.
MPRR	12,374,000	255,000/Yr.	1,180,000/Yr.
Terminal Operations			
St. Joseph, MO	109,000		
Council Bluffs, IA	1,805,000		59,000/Yr.
Changes in Blocking and Train Operations			
Via Kansas City	3,937,000		141,000/Yr.
Via Salt Lake City	505,000		19,000/Yr.
Total	19,474,000	(592,000/Yr.)	1,508,000/Yr.

The UP-MP system will require a net increase of 64 locomotive units valued at $42,974,000. In addition 17 cabooses valued at $934,000 are required. Total incremental locomotive requirements for a UP-MP-WP system are 110 units valued at $76,186,000 in addition to 27 cabooses valued at $1,515,000 which are required.

d. *Improved Access to Maintenance Facilities*

Defective equipment will be delivered to the nearest appropriate facility on the combined system for repair. This practice will make available to UP-MP the equivalent of three locomotive units with a replacement value of $2,100,000. It will save the UP-MP-WP [775] system the equivalent of four locomotive units with replacement value of $2,708,000. In addition, the equivalent of five freight cars valued at $213,000 can be realized by repairing UP out-of-service freight cars on WP.

The one-time cost of implementing programmed maintenance for the WP locomotive fleet will be $1,874,000. Programmed maintenance will make available the equivalent horsepower maintenance expenses for the WP locomotive fleet will be reduced by $481,000.

13. *Deferred Maintenance and Delayed Capital Expenditures*

UP has no deferred maintenance or delayed capital expenditures. MP's deferred maintenance and delayed capital expenditures will not be affected by the proposed consolidation. UP and WP contemplate the additional expenditure of $52.5 million, over the $38 million originally programmed, to raise the condition of WP roadway to UP standards. These expenditures will eliminate all WP deferred maintenance.

14. *Upgrading and Rehabilitation Plans*

Having identified total maintenance and upgrading requirments [sic] for affected corridors, the work currently programmed in each area was compared to the re-

vised programs to determine the incremental impact due to the proposed consolidation. A total incremental expenditure of $8,037,274 will be required for upgrading over a three year period. This incremental upgrading program is outlined as follows:

A) Missouri Pacific

Corridor—Kansas City to Diaz (White River)
Kansas City to Houston (KO&G)
Kansas City to St. Louis (River Subdivision)

Total Expenditures—$1,128,000 over 3 years

B) Union Pacific

Corridor—Kansas City to North Platte

Total Expenditures—$6,909,274 in first year

C) Western Pacific

Corridor—Oakland to Salt Lake City (Main Line)
Tidewater Southern (Subsidiary)
Sacramento Northern (Subsidiary)
San Jose, Reno, Bieber (Secondary)

Total Expenditures—$52,509,000 over 5 years

15. *Applicants' Costing Methodology*

In developing the annual net benefits of the proposed consolidation, applicants' have used an application of 1977 Rail Form A (Statement 1F1-73, *Formula For Use in Determining Rail-Freight Service Costs*), for each carrier party to the proposed consolidation, updated to a full year 1979 level. Traffic on the new system is costed on an each-to-each basis as it would move under the combined system. This means that the expenses (or benefits) resulting from this proposal are derived by applying the unit costs of each individual carrier to the activities performed (or not performed) by the carrier as a result of consolidation.

Certain modifications to Rail Form A were made to measure changes in costs more accurately. These changes primarily included the use of more specific operating and cost data in lieu of system averages. Costs do not include the depreciation or the cost of capital components normally associated with Rail Form A because these factors are separately determined.

[776] In addition, the unit costs developed for the Western Pacific exclude the labor portion of general overhead, programmed maintenance of way expense, and the 1979 cost of the WP-Southern Pacific pooling arrangement for the San Francisco Bay area traffic. Anticipated increased or decreased costs associated with each of these items were considered separately.

Switching for all three railroads were included on an estimated occurrence basis, but no switching expense was included where the existing switch engine assignments were judged capable of handling the additional switching requirements. Increased expense for the Terminal Railroad Association of St. Louis and Alton & Southern Railway Company services at St. Louis were also included.

Car costs were based on the specific tare weight and car hire rates for specific car types. Empty return ratios were developed for the car types incorporated in the 1979 OSA reports filed with the Commission. Rental for superstructures on multilevel flat cars was assumed to be $18 per day.

B. *Conclusions*

We find applicants' costing methodology and estimates of annual net benefits to be a reasonably accurate representation of the financial impact and operating environment as it will exist subsequent to the proposed consolidations.

We commend applicants' for their use of three individualized Rail Form A's in applying unit costs to the

various service units representative of each separate segment of traffic moved as part of the consolidated system. Several minor adjustments were made to the MP Rail Form A by applicant UP that reduced the net annual benefits derived from the economies realized as a result of better equipment utilization.

The operating plan as outlined by applicants attempts to realize to the maximum extent possible the economies available through the elimination of duplication in both investment and output.

We accept applicants' procedure of deriving the net effect of one-time costs versus one-time benefits and its application to determine the annual net benefits. Thus, for the combined system, a figure for both the annual net benefits and combined annual net benefits plus one-time benefits is achievable.

We recognize that certain assumptions relating to traffic diverted to the consolidated system are unavoidable in determining benefits as they impact on such areas as economies realized from increased traffic volumes as a result of common point consolidations and modifications at non-common points. These same traffic diversion assumptions also impact the economies of coordinated shop and repair facilities, maintenance-of-way, equipment requirements and utilization and track upgrading and rehabilitation.

We concur with the conclusion of applicants that the equipment requirements of the combined system at its peak demand periods would be less than the sum of the individual carrier peak requirements. This, as applicants point out, is premised on the fact that the individual railroads peak demand periods do not coincide. Thus, cars can be moved from one applicant to another applicant to cover the shortfall that results during peak periods. The combined capability of the three applicants reduces the number of cars needed to cover any one peak traffic period that would occur on applicants combined system.

We have restated applicants' estimates of net annual benefits for the consolidated system. This restatement affects, among other things, those benefits relating to equipment requirements and equipment utilization. Applicants consider the value of new equipment required by the consolidation to be an expense to be taken in the year the equipment is purchased, while they have capitalized the value of equipment investment saved by improved car utilization. Each of the treatments has the effect of reducing the estimated [777] short-term benefits and increasing the estimated long-term annual benefits. We believe both the value of equipment saved and equipment needed should be capitalized. *See Norfolk Southern*, 366 I.C.C. at 210.

Applicants contend that approximately $76 million in additional locomotives and cabooses will be required. This amount reflects the 1979 replacement value of such equipment. Applicants treat the amount as a one time cost to be spread over the first three years subsequent to consolidation at the rate of $52,995,000 the first year, $15,329,000 the second year and $7,666,000 the third year.

Rather than claiming the entire 1979 replacement value of $139,741,000 associated with cars saved, applicants include only $25,014,000 which is the return on that value at the 1979 rate of 17.9 percent. The $25,014,000 is treated as an annual benefit in each of the first three years and in the normal year. Applicants' approach is inappropriate in that it equates return on value of equipment saved with value (replacement cost) for equipment required. The value of equipment saved should be netted against the value of equipment needed. The 17.9 percent return should then be applied to the remaining benefit. For example, in year 1 the value of equipment saved of $139,741,000 will be reduced by the $52,995,000 value of equipment required. The 17.9 percent rate of return would then be applied to the remaining net benefit of

$86,746,000. In year 2 this net benefit would be reduced by another $15,329,000, with the 17.9 percent applied. Finally in year 3 the remaining net benefit would be reduced by $7,666,000, thus permanently reducing the original benefit to $63,751,000 ($139,741,000 minus $75,990,000). With the application of the 17.9 percent rate of return to this figure, a normal year benefit of $11,411,000 is realized. This figure is approximately $13,603,000 less than the original estimates of applicants.

We concur with applicants' assertion that capitalization of investments attributable to the handling of diverted traffic should be netted in the normal year with net revenue gained from those diversions to reach the appropriate estimate of private benefits derived by applicants.

Applicants have asserted that the new system will realize substantial benefits by internalizing production of various items or services which the individual railroads now purchase from outside concerns. Commission policy states that the benefits attributable to internalizing the various functions outlined in our Attachment A cannot properly be characterized as public benefits of the consolidation. A discussion of the Commission policy on this matter appears elsewhere in the analysis of this proceeding. Therefore, we cannot consider these savings of $9.6 million as public benefits of the consolidation. We will however continue to consider these monies to be private benefits accruing to applicants.

It is our estimate that approximately 10 million gallons of fuel will be saved annually by applicants as a result of efficiencies realized from consolidation. Applicants will realize approximately $3.6 million in annual benefits from the fuel savings. These monies have been recognized in both applicants' estimate and our estimate of benefits by their inclusion in improvements in operations as realized by more efficient equipment utilization.

A summary of applicants' estimate of the economic benefits resulting from consolidation is shown in Attachment B. We have restated these estimates in our Attachment C.

We subscribe to the costing methodology and operating plan as outlined by applicants. However, in Attachment B, we excluded benefits derived from diverted traffic from our calculation of annual net benefits. The benefits resulting from diverted traffic are discussed in Appendix H.

[778] IV. PROTESTANTS' DIRECT EVIDENCE

A. *Protestants' Direct Evidence*

Various protestants submitted evidence and arguments in response to applicants' estimates of net benefits derived as a result of the proposed consolidation. However, they are addressed primarily to the application of applicants' diversion evaluations as they impact the respective traffic diversion estimates. Protestants do not materially challenge applicants' development of annual net benefits resulting *solely* from the proposed operating plan.[1]

B. *Conclusion*

Protestant's focus their attention on applicants' estimates of traffic diverted as a result of this proposal and the impact of that diverted traffic on net annual benefits. We address the issue of traffic diversion in Appendix H. Here we are concerned about the annual net benefits

[1] Protestants KCS, MKT, ATSF and OSC argued that, for various reasons, applicants' development of savings resulting from more efficient equipment utilization was deficient. These arguments concerning, among other things, the existence and treatment of surplus equipment and empty cross-hauls, were unsupported by underlying data. Applicants, on the other hand, have supplied convincing data measuring the savings which they anticipate. Further, the Commission has accepted, in *Norfolk Southern*, 366 I.C.C. at 209-210, both the types of equipment utilization benefits described by applicants (reduced empty cross-hauls and seasonal utilization) and the methodology used in *Norfolk Southern* which is the same methodology used by applicants here.

achievable by the consolidated system exclusive of any benefits derived by increased diverted traffic.

However, we have not excluded from the annual net benefits those upgrading and rehabilitation expenditures necessitated by the forecasted increase in traffic volume resulting from diversion. We have included these expenditures in spite of our exclusion of the direct benefits of diversion because without question traffic will be diverted to the merged system and indeed substantial amounts of diverted traffic are not disputed by either applicants or protestants. Disputes do exist among the parties as to the size of several diversion estimates, however, the fact remains that sizeable traffic diversion will occur.

It is only in an indirect manner that protestants' criticism of applicants' costing methodology relates to the annual net benefits that are a function of the operating plan. Protestants argue that applicants have understated the amount of traffic to be diverted to the merged system. According to protestants, this understatement is caused by various faulty assumptions that temper the impact of the proposed consolidation as it affects competitors to the consolidated system. To the extent that applicants' diversion estimates are understated, the total annual net benefits of consolidation will differ for two reasons. First, the direct impact of an increase in traffic diversion estimates directly affects the annual net benefits derived as a result of the consolidation. If the alleged additional traffic is low rated traffic, there could be a negative impact when the revenue derived from this traffic is offset by the cost of moving the traffic. Again, this will be the thrust of our subsequent analysis which will address in detail the impact of all traffic diversions. Secondly, various operational assumptions are based on diversion estimates. Thus, any change in diversion estimates will accordingly alter the estimated benefits resulting from operational improvements.

APPENDIX H

ATTACHMENT A

Coordination of Shops and Repair Facilities Annual Net Benefits

	Private		Public		One-Time Benefits Public		One-Time Costs	
DeSoto, MO--------	Caboose Building-----	$129,569			HBO Caboose, Car Repair.	$5,100,000	Tooling----------	$110,000
			Car Doors----------	$20,290				
Kansas City, KS-MO-			Locomotive Repair-------	77,583	Wrecking Equipment--	75,000		
N. Little Rock, AR-	Couplers/Yokes	611,674	Car Wheels----------	134,074	Car Wheels----------	41,881		
	Locomotive Cab/Hoods-	211,062						
Omaha, NE---------	Component Repair-----	1,005,845	Consolidation Mech. Oper.	660,400	Consolidated Mech. Oper	13,725	DF Bar Equipment.	20,000
	DF Bar Repair-------	347,579	Engine Rebuilding-------	94,962				
Portland, OR-----	Car Building--------	7,326,674						
Salina, KS-------			Consolidation Mech. Oper.	29,849				
Sacramento, CA---			Wheel Operation---------	256,762	Wheel Operation-----	473,150		
Stockton, CA-----			Locomotive Repairs------	706,312	Car Repair----------	21,795		
			Car Repair----------	118,207				
			Consolidated Mech.Staff-	411,791				
			Consolidated Car Purchase.	164,219				
GeneralSub Total-		9,632,475		2,674,449		5,725,551		130,000
			Maintenance of Way Coordination					
Gads Hill, MO----			Ballast----------	306,579				
Little Rock, AR---			Tie Treating----------	24,740				
Laramie, WY------			Rail Welding----------	187,217				
			Tie Treating----------	429,562				
General----------			Staff Consolidation----	239,250				
			Ballast Cars----------	327,000				
Sub Total--------				1,514,348				
Grand Total------		9,632,475		4,188,797		5,725,551		130,000

ATTACHMENT B

Summary of applicant's estimate of economic benefits

YEAR 1 OF CONSOLIDATED OPERATIONS

($000)

	UPRR-MPRR-WPRR			UPRR-MPRR			UPRR-WPRR		
	Annual Net Benefits	One-Time Benefits Costs	Combined Annual Net and One-Time Benefits	Annual Net Benefits	One-Time Benefits Costs	Combined Annual Net and One-Time Benefits	Annual Net Benefits	One-Time Benefits Costs	Combined Annual Net and One-Time Benefits
1. Diverted Traffic [1] [2]	28,793		28,793	20,964		20,964	8,232		8,232
2. Improvements [1] in Operations:									
a. Common Point [3] Consolidations	4,659	1,067	5,726	4,222	1,067	5,289	408		408
b. Modifications at Non-Common Points		(1,457)			(1,457)	(1,457)			
c. Management Information Systems and Communications	27	(2,381)	(2,354)		(229)	(229)	27	(2,152)	(2,125)
d. Coordination of Shops and Repair Facilities	11,964	496	12,460	10,029	1	10,030	1,936	495	2,431
e. Maintenance of Way Coordination	1,275		1,275	549		549	726		726
f. Equipment Requirements		(51,159)	(51,159)		(29,119)	(29,119)		(18,375)	(18,375)
g. Equipment Utilization	22,500	(1,836)	20,664	18,600	(620)	17,980	3,008	(1,174)	1,834
3. Improvements in Administration [1] [4]	7,170		7,170	396		396	6,774		6,774
4. Labor Protection Costs	(29,362)		(29,362)	(17,558)		(17,558)	(11,804)		(11,804)
5. Upgrading and Rehabilitation		(25,153)	(25,153)		(7,533)	(7,533)		(17,620)	(17,620)
Totals	47,026	(80,423)	(33,397)	37,202	(37,890)	(688)	9,307	(38,826)	(29,519)
Totals Less Diverted Traffic	18,233	(80,423)	(62,190)	16,238	(37,890)	(21,652)	1,075	(38,826)	(37,751)

[1] Exclusive of labor protection costs which are stated separately in Item 4.

[2] Less revenue impact of internal rerouting of traffic on MPRR.

[3] Exclusive of estimated KCT upgrading cost: Year 1—$4,087.

[4] Includes cost of equalizing nonagreement benefits.

ATTACHMENT B

Summary of applicant's estimate of economic benefits

YEAR 2 OF CONSOLIDATED OPERATIONS

($000)

	UPRR-MPRR-WPRR			UPRR-MPRR			UPRR-WPRR		
	Annual Net Benefits	One-Time Benefits Costs	Combined Annual Net and One-Time Benefits	Annual Net Benefits	One-Time Benefits Costs	Combined Annual Net and One-Time Benefits	Annual Net Benefits	One-Time Benefits Costs	Combined Annual Net and One-Time Benefits
1. Diverted Traffic [1] [2]	37,019		37,019	26,954		26,954	10,584		10,854
2. Improvements [1] in Operations:									
a. Common Point [3] Consolidations	4,801		4,801	4,222		4,222	543		543
b. Modifications at Non-Common Points									
c. Management Information Systems and Communications	93		93				93		93
d. Coordination of Shops and Repair Facilities	11,964	5,100	17,064	10,029	5,100	15,129	1,936		1,936
e. Maintenance of Way Coordination	1,275		1,275	549		549	726		726
f. Equipment Requirements		(14,544)	(14,544)		(8,948)	(8,948)		(4,874)	(4,874)
g. Equipment Utilization	31,458	(785)	30,673	26,066		26,066	3,816	(785)	3,031
3. Improvements in Administration [1] [4]	13,494		13,494	5,672		5,672	7,822		7,822
4. Labor Protection Costs	(7,064)		(7,064)	(975)		(975)	(6,089)		(6,089)
5. Upgrading and Rehabilitation		(11,400)	(11,400)		(202)	(202)		(11,198)	(11,198)
Totals	93,040	(21,629)	71,411	72,517	(4,050)	68,467	19,431	(16,857)	2,574
Totals Less Diverted Traffic	56,233	(21,629)	34,392	45,563	(4,050)	41,513	8,847	(16,857)	(8,010)

[1] Exclusive of labor protection costs which are stated separately in Item 4.

[2] Less revenue impact of internal rerouting of traffic on MPRR.

[3] Exclusive of Year 2 upgrading on KCT—$200.

[4] Includes cost of equalizing nonagreement benefits.

ATTACHMENT B

Summary of applicant's estimate of economic benefits

YEAR 3 OF CONSOLIDATED OPERATIONS

($000)

	UPRR-MPRR-WPRR			UPRR-MPRR			UPRR-WPRR		
	Annual Net Benefits	One-Time Benefits Costs	Combined Annual Net and One-Time Benefits	Annual Net Benefits	One-Time Benefits Costs	Combined Annual Net and One-Time Benefits	Annual Net Benefits	One-Time Benefits Costs	Combined Annual Net and One-Time Benefits
1. Diverted Traffic [1] [2]	41,132		41,132	29,949		29,949	11,760		11,760
2. Improvements [1] in Operations:									
a. Common Point [3] Consolidations	4,873		4,873	4,222		4,222	610		610
b. Modifications at Non-Common Points									
c. Management Information Systems and Communications	518		518				518		518
d. Coordination of Shops and Repair Facilities	11,964		11,964	10,029		10,029	1,936		1,936
e. Maintenance of Way Coordination	1,275		1,275	549		549	726		726
f. Equipment Requirements		(7,666)	(7,666)		(4,056)	(4,656)		(2,947)	(2,947)
g. Equipment Utilization	31,458	(785)	30,673	26,066		26,066	5,816	(785)	5,031
3. Improvements in Administration [1] [4]	13,528		13,528	5,672		5,672	7,856		7,856
4. Labor Protection Costs	(5,874)		(5,874)	(555)		(555)	(5,319)		(5,319)
5. Upgrading and Rehabilitation		(10,801)	(10,801)		(302)	(302)		(10,499)	(10,499)
Totals	99,422	(18,467)	80,955	76,245	(4,358)	71,887	22,124	(13,446)	8,678
Totals Less Diverted Traffic	58,290	(18,467)	39,823	46,296	(4,358)	41,938	10,364	(13,446)	(3,082)

[1] Exclusive of labor protection costs which are stated separately in Item 4.

[2] Less revenue impact of internal rerouting of traffic on MPRR.

[3] Includes cost of equalizing nonagreement benefits.

ATTACHMENT B

Summary of applicant's estimate of economic benefits

YEAR 4 OF CONSOLIDATED OPERATIONS

($000)

	UPRR-MPRR-WPRR			UPRR-MPRR			UPRR-WPRR		
	Annual Net Benefits	One-Time Benefits Costs	Combined Annual Net and One-Time Benefits	Annual Net Benefits	One-Time Benefits Costs	Combined Annual Net and One-Time Benefits	Annual Net Benefits	One-Time Benefits Costs	Combined Annual Net and One-Time Benefits
1. Diverted Traffic [1] [2]	41,132		41,132	29,949		29,949	11,760		11,760
2. Improvements [1] in Operations:									
a. Common Point [3] Consolidations	4,873		4,873	4,222		4,222	610		610
b. Modifications at Non-Common Points									
c. Management Information Systems and Communications	518		518				518		518
d. Coordination of Shops and Repair Facilities	11,964		11,964	10,029		10,029	1,936		1,936
e. Maintenance of Way Coordination	1,275		1,275	549		549	726		726
f. Equipment Requirements									
g. Equipment Utilization	32,006		32,006	26,379		26,379	4,037		4,037
3. Improvements in Administration [1] [4]	13,528		13,528	5,672		5,672	7,856		7,856
4. Labor Protection Costs	(4,921)		(4,921)				(4,921)		(4,921)
5. Upgrading and Rehabilitation		(7,967)	(7,967)					(7,967)	(7,967)
Totals	100,375	(7,967)	92,408	76,800		76,800	22,522	(7,967)	14,555
Totals Less Diverted Traffic	59,243	(7,967)	(51,276)	46,851		46,851	10,762	(7,967)	2,795

[1] Exclusive of labor protection costs which are stated separately in Item 4.

[2] Less revenue impact of internal rerouting of traffic on MPRR.

[3] Includes cost of equalizing nonagreement benefits.

[4] Net figure reflected in 2i.

ATTACHMENT B

Summary of applicant's estimate of economic benefits

YEARS 5 OF CONSOLIDATED OPERATIONS

($000)

	UPRR-MPRR-WPRR			UPRR-MPRR			UPRR-WPRR		
	Annual Net Benefits	One-Time Benefits Costs	Combined Annual Net and One-Time Benefits	Annual Net Benefits	One-Time Benefits Costs	Combined Annual Net and One-Time Benefits	Annual Net Benefits	One-Time Benefits Costs	Combined Annual Net and One-Time Benefits
1. Diverted Traffic [1] [2]	41,132		41,132	29,949		29,949	11,760		11,760
2. Improvements [1] in Operations:									
a. Common Point [3] Consolidations	4,873		4,873	4,222		4,222	610		610
b. Modifications at Non-Common Points									
c. Management Information Systems and Communications	518		518				518		518
d. Coordination of Shops and Repair Facilities	11,964		11,964	10,029		10,029	1,936		1,936
e. Maintenance of Way Coordination	1,275		1,275	549		549	726		726
f. Equipment Requirements									
g. Equipment Utilization	32,006		32,006	26,379		26,379	4,037		4,037
3. Improvements in Administration [1] [4]	13,528		13,528	5,672		5,672	7,856		7,856
4. Labor Protection Costs	(4,665)		(4,665)				(4,665)		(4,665)
5. Upgrading and Rehabilitation		(5,798)	(5,798)					(5,798)	(5,798)
Totals	100,631	(5,798)	94,833	76,800		76,800	22,778	(5,798)	16,980
Totals Less Diverted Traffic	59,499	(5,798)	(53,701)	46,851		46,851	11,018	(5,798)	5,220

[1] Exclusive of labor protection costs which are stated separately in Item 4.

[2] Less revenue impact of internal rerouting of traffic on MPRR.

[3] Includes cost of equalizing nonagreement benefits.

[4] Net figure reflected in 2i.

ATTACHMENT B

Summary of applicant's estimate of economic benefits

NORMAL YEAR OF CONSOLIDATED OPERATIONS

($000)

	UPRR-MPRR-WPRR			UPRR-MPRR			UPRR-WPRR		
	Annual Net Benefits	One-Time Benefits Costs	Combined Annual Net and One-Time Benefits	Annual Net Benefits	One-Time Benefits Costs	Combined Annual Net and One-Time Benefits	Annual Net Benefits	One-Time Benefits Costs	Combined Annual Net and One-Time Benefits
1. Diverted Traffic [1] [2]	41,132		41,132	29,949		29,949	11,760		11,760
2. Improvements [1] in Operations:									
a. Common Point [3] Consolidations	4,873		4,873	4,222		4,222	610		610
b. Modifications at Non-Common Points									
c. Management Information Systems and Communications	518		518				518		518
d. Coordination of Shops and Repair Facilities	11,964		11,964	10,029		10,029	1,936		1,936
e. Maintenance of Way Coordination	1,275		1,275	549		549	726		726
f. Equipment Requirements									
g. Equipment Utilization	32,006		32,006	26,379		26,379	4,037		4,037
3. Improvements in Administration [1] [4]	13,528		13,528	5,672		5,672	7,856		7,856
4. Labor Protection Costs									
5. Upgrading and Rehabilitation	(4,190)		(4,190)				(4,190)		(4,190)
Totals	101,106		101,106	76,800		76,800	23,253		23,253
Totals Less Diverted Traffic	59,974		59,974	46,851		46,851	11,493		11,493

[1] Less revenue impact of internal rerouting of traffic on MPRR.

[2] Includes cost of equalizing nonagreement benefits.

[3] Represents required incremental normalized level of program maintenance.

[4] Net figure reflected in 2i.

[786]

ATTACHMENT B

Five-Year Summary of Applicant's Estimates of Economic Benefits[1]

$(000)

	1st Year	2nd Year	3rd Year	4th Year	5th Year	Totals
UPRR-MPRR-WPRR	(62,190)	34,392	39,823	51,276	53,701	117,002
UPRR-MPRR	(21,652)	41,513	41,938	46,851	46,851	155,501
UPRR-WPRR	(37,751)	(8,010)	(3,082)	2,795	5,220	(40,828)

[1] Annual net economic benefit in normal year after giving full effect to changes resulting from consolidation, but not including benefits derived from diverted traffic.

ATTACHMENT C

Commission Restatement of Economic Benefits Year 1 of Consolidated Operations

$(000)

	UPRR-MPRR-WPRR		
	Annual Net Benefits	One-Time Benefits/ Costs	Combined Annual Net and One-Time Benefits/Costs
1. Diverted Traffic [1 2 5]	40,000		40,000
2. Improvements [1] in Operations			
a. Common Point [3] Consolidations	4,659	1,067	5,726
b. Modifications at Non-Common Points		(1,457)	(1,457)
c. Management Information Systems and Communications	27	(2,381)	(2,354)
d. Coordination of Shops and Repair Facilities (Private Benefit)	9,632	5,726	15,358
e. Coordination of Shops and Repair Facilities (Public Benefit)	4,189		4,189
f. Maintenance of Way Coordination	1,275		1,275
g. Equipment Requirements			
h. Equipment Utilization	22,500	(1,836)	20,664
i. I. Less Capital Costs of h. (Private Benefit)	24,500		24,500
3. Improvements in Administration [1 4]	7,170		7,170
4. Labor Protection Costs	(29,362)		(29,362)
5. Upgrading and Rehabilitation		(25,153)	(25,153)
TOTAL BENEFITS (not including 1.)	44,590	(24,034)	20,556
Total Less 2d and 2i (Public Benefits)	10,458	(29,760)	(19,302)
Exclusively Private Benefits	40,211	(24,571)	15,640
(Total Less Public)	34,132	5,726	39,858

[1] Exclusive of labor protection costs which are stated separately in Item 4.

[2] Less revenue impact of internal rerouting of traffic on MPRR.

[3] Exclusive of estimated KCT upgrading cost: Year 1—$4,087.

[4] Includes cost of equalizing nonagreement benefits.

[5] Net figure reflected in 2i.

[787]

ATTACHMENT C

Commission Restatement of Economic Benefits Year 2 of Consolidated Operations

$(000)

	UPRR-MPRR-WPRR		
	Annual Net Benefits	One-Time Benefits/ Costs	Combined Annual Net and One-Time Benefits/Costs
1. Diverted Traffic [1] [2] [5]	40,000		40,000
2. Improvements [1] in Operations			
a. Common Point [3] Consolidations	4,801		4,801
b. Modifications at Non-Common Points			
c. Management Information Systems and Communications	93		93
d. Coordination of Shops and Repair Facilities (Private Benefit)	9,632	9,632	15,358
e. Coordination of Shops and Repair Facilities (Public Benefit)	4,189		4,189
f. Maintenance of Way Coordination	1,275		1,275
g. Equipment Requirements			
h. Equipment Utilization	31,458	(785)	30,673
i. I. Less Capital Costs of h. (Private Benefit)	27,200		27,200
3. Improvements in Administration [1] [4]	13,494		13,494
4. Labor Protection Costs	(7,064)		(7,064)
5. Upgrading and Rehabilitation		(11,400)	(11,400)
TOTAL BENEFITS (not including 1.)	85,078	(12,185)	72,893
Total Less 2d and 2i (Public Benefits)	48,246	(12,185)	36,061
Exclusively Private Benefits (Total Less Public)	36,832		36,832

[1] Exclusive of labor protection costs which are stated separately in Item 4.

[2] Less revenue impact of internal rerouting of traffic on MPRR.

[3] Exclusive of estimated KCT upgrading cost: $200.

[4] Includes cost of equalizing nonagreement benefits.

[5] Net figure reflected in 2i.

[788]

ATTACHMENT C

Commission Restatement of Economic Benefits Year 8 of Consolidated Operations

$(000)

	UPRR-MPRR-WPRR		
	Annual Net Benefits	One-Time Benefits/ Costs	Combined Annual Net and One-Time Costs/ Benefits
1. Diverted Traffic [1 2 4]	40,000		40,000
2. Improvements [1] in Operations			
a. Common Point Consolidations	4,873		4,873
b. Modifications at Non-Common Points			
c. Management Information Systems and Communications	518		518
d. Coordination of Shops and Repair Facilities (Private Benefit)	9,632		9,632
e. Coordination of Shops and Repair Facilities (Public Benefit)	4,189		4,189
f. Maintenance of Way Coordinations	1,275		1,275
g. Equipment Requirements			
h. Equipment Utilization	32,006		32,006
i. I. Less Capital Costs of h. (Private Benefit)	28,600		28,600
3. Improvements in Administration [1 3]	13,528		13,528
4. Labor Protection Costs	(5,874)		(5,874)
5. Upgrading and Rehabilitation		(10,801)	(10,801)
TOTAL BENEFITS (not including I.)	88,747	(10,801)	77,946
Total Less 2d and 2i (Public Benefits)	50,515	(10,801)	39,714
Exclusively Private Benefits (Total Less Public)	38,232		38,232

[1] Exclusive of labor protection costs which are stated separately in Item 4.

[2] Less revenue impact of internal rerouting of traffic on MPRR.

[3] Includes cost of equalizing nonagreement benefits.

[4] Net figure reflected in 2i.

[789]

ATTACHMENT C

Commission Restatement of Economic Benefits Year 4 of Consolidated Operations

$(000)

	UPRR-MPRR-WPRR		
	Annual Net Benefits	One-Time Benefits/ Costs	Combined Annual Net and One-Time Benefit/Costs
1. Diverted Traffic [1] [2] [4]	40,000		40,000
2. Improvements [1] in Operations			
a. Common Point Consolidations	4,873		4,873
b. Modifications at Non-Common Points			
c. Management Information Systems and Communications	518		518
d. Coordination of Shops and Repair Facilities (Private Benefit)	9,632		9,632
e. Coordination of Shops and Repair Facilities (Public Benefit)	4,189		4,189
f. Maintenance of Way Coordination	1,275		1,275
g. Equipment Requirements			
h. Equipment Utilization	32,006		32,006
i. I. Less Capital Costs of h. (Private Benefit)	28,600		28,600
3. Improvements in Administration [1] [3]	13,528		13,528
4. Labor Protection Costs	(4,921)		(4,921)
5. Upgrading and Rehabilitation		(7,967)	(7,967)
TOTAL BENEFITS (not including I.)	89,700	(7,967)	81,733
Total Less 2d and 2i (Public Benefits)	51,468	(7,967)	43,501
Exclusively Private Benefits (Total Less Public)	38,232		38,232

[1] Exclusive of labor protection costs which are stated separately in Item 4.

[2] Less revenue impact of internal rerouting of traffic on MPRR.

[3] Includes cost of equalizing nonagreement benefits.

[4] Net figure reflected in 2i.

[790]

ATTACHMENT C

Commission Restatement of Economic Benefits Year 5 of Consolidated Operation

$(000)

	UPRR-MPRP-WPRR		
	Annual Net Benefits	One-Time Benefits/ Costs	Combined Annual Net and One-Time Benefit/Costs
1. Diverted Traffic [1] [2] [4]	40,000		40,000
2. Improvements [1] in Operations			
a. Common Point Consolidations	4,873		4,873
b. Modifications at Non-Common Points			
c. Management Information Systems and Communications	518		518
d. Coordination of Shops and Repair Facilities (Private Benefit)	9,632		9,632
e. Coordination of Shops and Repair Facilities (Public Benefit)	4,189		4,189
f. Maintenance of Way Coordination	1,275		1,275
g. Equipment Requirements			
h. Equipment Utilization	32,006		32,006
i. I. Less Capital Costs of h.	28,600		28,600
3. Improvements in Administration [1] [3]	13,528		13,528
4. Labor Protection Costs	(4,665)		(4,665)
5. Upgrading and Rehabilitation		(5,798)	(5,798)
TOTAL BENEFITS (not including I.)	89,956	(5,798)	84,158
Total Less 2d and 2i (Public Benefits)	51,724	(5,798)	45,926
Exclusively Private Benefits (Total Less Public)	38,232		38,232

[1] Exclusive of labor protection costs which are stated separately in Item 4.

[2] Less revenue impact of internal rerouting of traffic on MPRR.

[3] Includes cost of equalizing nonagreement benefits.

[4] Net figure reflected in 2i.

[791]

ATTACHMENT C

Commission Restatement of Economic Benefits Normal Year of Consolidated Operations

($000)

	UPRR-MPRR-WPRR		
	Annual Net Benefits	One-Time Benefits/ Costs	Combined Annual Net and One-Time Benefit/Costs
1. Diverted Traffic [1 2 4]	40,000		40,000
2. Improvements in Operations [1]			
a. Common Point Consolidations	4,873		4,873
b. Modifications at Non-Common Points			
c. Management Information Systems and Communications	518		518
d. Coordination of Shops and Repair Facilities (Private Benefit)	9,632		9,632
e. Coordination of Shops and Repair Facilities (Public Benefit)	4,189		4,189
f. Maintenance of Way Coordination	1,275		1,275
g. Equipment Requirements			
h. Equipment Utilization	32,006		32,006
i. I. Less Capital Costs of h.	28,600		28,600
3. Improvements in Administration [1 3]	13,528		13,528
4. Labor Protection Costs	(4,665)		(4,665)
5. Upgrading and Rehabilitation	(4,190)		(4,190)
TOTAL BENEFITS (not including I.)	85,766		85,766
Total Less 2d and 2i (Public Benefits)	47,534		47,534
Exclusively Private Benefits (Total Less Public)	38,232		38,232

[1] Exclusive of labor protection costs which are stated separately in Item 4.

[2] Less revenue impact of internal rerouting of traffic on MPRR.

[3] Includes cost of equalizing nonagreement benefits.

[4] Net figure reflected in 2i.

ATTACHMENT C

Five-Year Summary of Public Benefits

($000)

	1st Year	2nd Year	3rd Year	4th Year	5th Year	Normal Year
UPRR-MPRR-WPRR	(19,302)	36,061	39,714	43,501	45,926	47,534

Five-Year Summary of Private Benefits

($000)

UPRR-MPRR-WPRR	39,858	36,832	38,232	38,232	38,232	38,232

[792] # APPENDIX I

Cost Analysis-Diversions

I CONCLUSION

Our restatement of the cost of handling diverted traffic is summarized below.

Rail Traffic

	Applicants	Protestants
	Million	*Million*
Gross Revenue Diverted	$184.8	$184.8
Variable Cost of Handling Diverted Traffic	145.9	144.7
Net Revenue Diverted	38.9	40.9
Private Benefit	38.9	.....
Non-Rail Traffic [1]		
	Million	*Million*
Gross Revenue Diverted	$32.5	$32.5
Variable Cost of Handling Diverted Traffic	24.7	24.7
Net Revenue Diverted	7.8	7.8
Private Benefit	7.8	.....
Total Private Benefit	46.7	.....

[1] As shown by Applicants.

Attachments 1 through 4 summarize the data leading us to these conclusions.

II INTRODUCTION

This analysis addresses the issue of net revenue gain (or loss) to be derived by the consolidated UP-MP-WP system as a result of traffic being diverted to it from other carriers whose systems will potentially lose traffic to the new system. Additionally, we have calculated the net revenue gain (or loss) realized by those carriers whose traffic will be diverted to the consolidated system. The amount of gross revenue gained by the system (which is the sum of those amounts realized as gross revenue gained by the system (which is the sum of those amounts

realized as gross revenue losses by the protesting railroads according to our own analyses in Appendix F) is netted with the additional cost of providing the service necessary to handle the diverted traffic.

III APPLICANTS' COST STUDY

Applicants have submitted both a rail traffic diversion study and a non-rail traffic diversion study. The costing methodology used by applicant is a 1979 application of Rail Form [793] A[1] for each of the three carriers seeking to be included in the consolidation. Each railroad was capable of constructing its 1979 accounting data under the previously used 1977 system of accounts. The system unit costs for each railroad were used in determining the cost of providing service over each carriers [sic] segments of line. Certain modification were made to Rail Form A to better utilize more specific operating and cost data in lieu of system averages. The costs do not include depreciation or cost of capital components. Additionally, the unit costs developed for the WP exclude the labor portion of general overhead, programmed maintenance-of-way expense and the 1979 cost of the WP-SP pooling arrangement for San Francisco Bay area traffic.

Switching for all three railroads was included on an estimated occurrence basis. No switching expense was included where the existing engine assignments were judged capable of handling the additional switching requirements. Increased expenses for the switching services of the Terminal Railroad Association of St. Louis and the Alton and Southern Railway Company are included.

Car costs are based on specific tare weights and car hire rates. Car hire expenses on applicants' cars were increased to reflect repair costs at an average 1979 level in lieu of those incorporated in the car hire rates.

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[1] ICC Statement No. 1F1-73 Formula for Use in Determining Rail Freight Service Costs.

Using the foregoing, applicants' costs and applicants' estimates of protestants' costs were calculated on the route over which the traffic moved in 1979 and the route over which the traffic will move after the consolidation. Attachment I summarizes the results of applicants' rail and non-rail traffic diversion studies as they relate to traffic diverted to applicants from other roads. Those gross revenues being diverted from protestants [sic] railroads measured by applicants are listed below:

Protesting Railroad	*Gross Revenue Diverted to UP-MP-WP ($000)*
ATSF	$ 13,951
BN-Frisco	42,608
CNW	8,396
DRGW	29,846
ICG	9,398
KCS	3,152
Milwaukee	1,075
MKT	14,307
SP-SSW	33,217
Total	$155,950

Analysis of the data bases, statistical sampling techniques and criteria for traffic diversion evaluation used by applicants' [sic] is addressed in Appendix F.

IV PROTESTANTS TRAFFIC DIVERSION STUDIES

1. *Southern Pacific*

Southern Pacific has utilized a 1979 application of Rail Form A in its development of the costs associated with traffic forecast for diversion to the merged system. This was accom- [794] plished by restructuring the 1979 accounting data under the present uniform system of accounts into the accounting format used prior to 1978 for input into Rail Form A. Included in this study are estimates of losses attributable to traffic diverted from SP's so called "Central Corridor Gathering Area." This area includes Oregon, northern California and Nevada. SP

claims a substantial amount of traffic from this area would be diverted to the merged system. The 1979 unit costs resulting from the Rail Form A application were adjusted to exclude the return element from operating expenses. Tare weights for the various types of freight cars at issue were developed from a data base regularly maintained by the AAR containing tare weight data by Universal Machine Equipment Register (UMLER) car type codes. These UMLER file results represent a national average tare weight per car type that include both private and railroad-owned cars.

Empty return ratios reflect the 1979 experience of both SP and SSW by car groups as developed from their respective 1979 OSA forms. To further amplify traffic diversion analysis, protestant SP has conducted a carload to intermodal diversion study intended to estimate the amount of SP carload traffic potentially divertible to applicant's TOFC service. The issue traffic consists of movements included in SP's primary traffic diversion analysis and as such the results of the intermodal study are given effect in the figures shown below. SP calculates the net revenue loss to itself and the SSW as follows:

	SP-SSW System (Includes Central Corridor)	Central Corridor Gathering Area Portion
Gross Revenue Loss	$105,159,000	$80,300,000
Avoidable Cost of Handling Lost Traffic [1]	$82,379,000	$27,100,000
Net Revenue Loss	$22,780,000	$53,200,000

[1] Protestant SP has labeled these costs as "avoidable." We are unable to ascertain the difference from total variable cost which would render these costs "avoidable". We have treated them as total variable costs.

2. *Missouri-Kansas-Texas*

Like other protestants in this proceeding, MKT has used a standard application of Rail Form A for the year 1979 while incorporatng [sic] numerous adjustments to the development of unit costs for certain cost categories.

In one application, all expense inputs were taken at their full 1979 amounts without the use of the usual percents variable for the various groups of accounts contained in Appendix F of ICC Statement No. ICI-77, *Rail Carload Cost Scales, 1977*. Modifications were then made to Rail Form A in two categories of expenses; first, those accounts where the projected traffic loss would not result in any reduced 1979 expense dollars were excluded; secondly, those accounts or portions of accounts that would be subject to direct special studies were excluded to avoid the possibility of duplication. By using two "versions" of Rail Form A, protestant claims to have measured the maximum amount of dollar savings in costs for the projected diverted traffic to the consolidated system.

Car costs were developed using time and mileage per diem costs, including incentive per diem, for both foreign cars and MKT cars. Foreign car costs are those costs which would not have been incurred had the cars not moved over the MKT in 1979. For MKT cars, in lieu of being loaded and moving on the MKT, owned and leased cars would be off-line earning per diem. Protestant claims it would be successful in placing its cars off-line 50 per-
[795] cent of the time. Calculation of the per diem surrogate for carrier car cost was done on a car-by-car basis. The 1979 MKT system empty return ratio was applied to loaded miles and loaded days for each movement.

Special studies were conducted of the reduced costs related to fewer rail cars being handled by terminal companies serving the present MKT system at St. Louis, Houston, Galveston and Texas City, TX. Also, special studies of reduced charges were made for five locations where the MKT now makes trackage payments to various railroads.

Protestant believes there will exist a reduced equipment need for eight locomotives and two cabooses made

idle due to the projected decrease in train-miles and locomotive unit-miles. Finally, as a result of handling an estimated 25,919 fewer carloads due to the consolidation, MKT studied the decrease in labor expenses expected to be realized.

Shown below in summary are the results of the costing methodology used by protestant MKT.

Gross Revenue Loss	$23,458,656
Variable Cost of Handling Lost Traffic	$12,270,731
Net Revenue Loss	$11,187,925

3. *Kansas City Southern*

The Kansas City Southern has used a 1979 application of Rail Form A. Its methodology departs from other protestants in that unit train movements were deemed not divertible and as such expenses associated with unit train service have been excluded from 1979 Rail Form A data. Like other protestants however, KCS also excludes depreciation and capital costs from its Rail Form A expense base.

Car costs are developed from the per diem and mileage rates contained in the UMLER file. Switching costs were 1979 Rail Form A average costs per switch excluding capital costs. This is also true for gross ton-mile, train supplies and expenses, car inspection expenses, station clerical, special services and loss and damage clerical expenses. Loss and damage expenses were calculated using the actual KCS experience for the year 1979.

The KCS points out what it claims to be three deficiencies in applicants' costing methodology applied to diverted traffic. First, it claims applicants have failed to account for the impact of diverted traffic on certain switching costs at 65 major terminals. Second, protestant contends that because there were no projected diversion of unit trains in applicants' traffic diversion study, trailing tons and locomotives associated with unit trains should be eliminated from the system average data. Finally, KCS asserts that applicants should have used a 17.9 percent

cost of capital in calculating costs associated with diverted traffic rather than the 11.94 percent actually employed, since applicants used a 17.9 percent return in its calculations of equipment utilization benefits. The KCS study results are shown below.

Gross Revenues Lost	$8,535,000
Variable Cost of Handling Lost Traffic	$6,710,000
Net Revenue Lost	$1,825,000

4. *Santa Fe*

The Atchison, Topeka and Santa Fe Railway Company in its traffic diversion study has applied Rail Form A to 1979 expense data formulated under the 1977 Uniform System of Accounts. In ATSF's application of Rail Form A for 1979, certain assumptions were made as input into the formula.

[796] All cars travel either empty or loaded at an average distance of 480 miles per day. Line-haul costs are based on the movement of freight in both way and through trains. Each interchange requires one-half day of car time. Each terminal requires an average of 4.0 days of car time for other than mileage cars, 3.8 days for General Service boxcars, 2.0 days for TOFC flatcars and 4.0 days for trailers. The ratio of total cars switched to loaded cars switched is 2.0 for other than Mileage Cars and 1.8 for General Service boxcars. ATSF's system average switching times were utilized at interchanges and terminals. ATSF's average empty return factors by equipment type and ownership were used. Time, mileage and incentive rates for both ATSF and foreign equipment were taken from the UMLER file as were freight car tare weights. Loss and damage was included as a percentage of ATSF gross revenue rather than as an amount per ton as prescribed in Rail Form A.

Results of the Santa Fe Traffic study are as follows.

Gross Revenue Lost	$64,015,261
Variable Cost of Handling Lost Traffic	$27,609,942
Net Revenue Lost	$36,405,319

V SUMMARY

The fundamental costing methodology used by all parties in this proceeding is not in dispute. Those methodological differences that do exist would not materially alter the costs of providing the service associated with the traffic deemed divertible. The primary area of contention lies not with costing methodology but rather the determination of which movements are indeed divertible to applicants as a result of consolidation. This issue is discussed in the analysis in Appendix F.

A. *Applicants' Evidence*

The net operating savings projected by applicants have been calculated by use of a systematic analysis in which various functions were studied by location to determine the effects of changed practices following the consolidation. A reasonable rationale was offered for implementation and advance planning required to integrate the proposed changes in the flow of loaded and empty cars over the combined system. Necessary modifications to the physical plant and provisions for staffing were well conceived.

We find that applicants use of variable costs developed from applications of Rail Form A was appropriate in projecting the changes in their costs expected to arise from the rerouting of both diverted and nondiverted traffic following the consolidation. Because applicants anticipate that no significant changes in handling will result, the long run nature of variable unit costs in Rail Form A are appropriate for determining the effect on net income of implementing the operating plan.

Applicants have adequately refuted the allegations raised by protestant KCS concerning the costing of diverted traffic. As shown in Attachment 1, applicants estimate the amount of gross revenue diverted to them at approximately $159.2 million. Costs are estimated at ap-

proximately $125.7 million, which would yield, according to applicants, $33.5 million in net revenue from diverted traffic. These data reflect only the rail portion of applicants' diversion study.

Because we have not altered applicants estimates of gross revenue diversions from non-rail traffic (Appendix F-1) and we have accepted applicants estimates of the costs of handling diverted traffic, we accepted applicants calculation of a $7.8 million net revenue gain resulting from diversion of non-rail traffic to applicants.

[797]

B. *Protestants' Evidence*

Rail Form A is a satisfactory method for ascertaining the variable cost of diverted traffic on the consolidated lines. Due to our restatement of diverted traffic levels we are unable to apply RFA costing techniques to the traffic at issue. While there exists convincing evidence that applicants will have implemented their operating plan and realized substantial savings by the end of the third year after merger, it appears that protestants will require a much longer time frame in which to adjust to the changed competitive conditions following consolidation.

Our conclusions are based on the acceptance of applicants costing methodology, the results of which have been used to restate the impact of traffic diversions on the seven protesting railroads. As previously stated, protestants' major objections do not lie with applicants basic costing methodology but rather the underlying assumptions determining the selection of traffic that is indeed divertible.

Our acceptance of applicants' methodology is based on our conclusion that while we have no serious criticism of the costing methodologies employed by protestants SP, KCS and DRGW (discussed later), their results reflect

essentially the same assumptions and methods (adjustments) as those of applicants. Indeed, the resulting operating ratios for handling potentially divertible traffic are virtually the same for applicants, SP and KCS using their individual approaches, that is, applicants 78.96 percent, SP 78.29 percent and KCS 78.65 percent.

Protestant MKT has used a costing approach whereby certain accounts in Rail Form A were deemed by them to be unaffected by the diversion of traffic to applicants and as such they were excluded from the application of the 1979 Rail Form A. Protestant lists the various accounts that were or were not included in the Rail Form A. However, MKT does not quantify any of the amounts either included or excluded. Protestant would simply have us accept its estimate of the costs associated with handling diverted traffic. That estimate as stated earlier is $12,270,731, as compared with its estimate of $23,-458,656 for gross divertible revenue. These figures yield an operating ratio for the traffic at issue of 52.3 percent. MKT gives several explanations as to why certain accounts were either included in part, by special study, or fully. However no explanation is given as to why certain accounts were excluded. We do not disagree conceptually with protestant in its general approach. However, we find the support for that approach completely lacking. From the data of record we are not able to verify the accuracy of the protestant's estimate, and thus reject its results.

Like protestant MKT, protestant ATSF's costing presentation affords us few quantifiable amounts from which to verify the results of its study. Certain inconsistencies exist relative to protestant's various showings of the ATSF costs, both before and after traffic diversion.

In spite of ATSF's argument that we include cost of capital in our calculation of the costs of handling diverted traffic, for the sake of consistency we have chosen to exclude cost of capital, thus affording us comparisons with

applicants and other protestants. In addition to its showing of cost savings resulting from this proceeding, protestant has supplied like data for the cumulative effects of this consolidation and "other recent western rail consolidations." As shown in the table below, ATSF has supplied two substantially different estimates of its costs after diversion for this latter cumulative data. This difference is so large that it casts doubt as to the accuracy of its estimate for the data pertaining to this proceeding only.

[798]

	Cumulative Results of UP-MP-WP and Other Recent Western Consolidations (ATSF-H-113)		Results of only UP-MP-WP	ICC Restatement of Costs Only
Gross revenues lost	$174,170,877	$174,170,877	$64,015,261	[4] $64,015,261
ATSF costs before diversion	290,573,506	290,573,506	290,573,506	290,573,506
ATSF costs after diversion	[1] 219,846,200	[2] 152,835,581	[3] 262,963,564	236,808,657
Cost savings from traffic losses	$70,727,306	$137,737,925	$27,609,942	$53,764,849
			Percent	
Operating Ratio	40.61	79.08	43.13	83.99

[1] Source ATSF-H-113, APPENDIX PKR-2.

[2] Source ATSF-H-114, APPENDIX A.

[3] Source ATSF-H-113, APPENDIX PKR-1.

[4] Assuming Protestants Estimate.

Our restatement of protestant's costs is not based on an item by item analysis of cost categories since ATSF has not provided us with the data to perform such an analysis; it is developed in the following manner. Recognizing the disparity in protestants' two estimates of costs after diversion for a number of recent western consolidations, using ATSF's $152.8 million estimate of costs yields a net savings from traffic losses 94.73 percent higher than the other (70.7) estimate. Applying this figure to the UP-MP-WP consolidation results in a net cost of handling diverted traffic of $53,764,849. This net cost yields an operating ratio for divertible traffic of 83.99 percent when

compared with ATSF's estimate of gross revenue to be lost by diversion ($64,015,261). This figure is more in accord with those developed by applicants and protestants SP and KCS.

C. *Restatement*

As we have stated in Appendix F, the diversion estimates of applicants are understated and the estimates of protestants are overstated. Attachment 2 outlines these estimates as developed by applicants, protestants and the Commission. As seen in Attachment 2, two protestants, CNW and Conrail have reached settlements with applicants and thus have withdrawn their opposition to the application. BN has based its entire diversion estimate on potential loss of coal traffic revenues in year 1985; treatment of the coal issue appears elsewhere in the proceeding. Therefore, we have not estimated the costs of handling diverted traffic for these three protestants. Of the remaining seven protestants, we have accepted the estimates of gross revenue diversion as shown by three railroads, DRGW, ICG and Milwaukee Road. We have developed the cost of handling the diverted traffic for these three roads in the same manner in which we treat the costs of the other four protesting railroads (SP, KCT, MKT, ATSF) for which we have restated the amount of gross revenue lost due to traffic diversion.[2]

Since none of the parties on this record (including applicants) submitted estimates of the costs of handling each potentially divertible shipment, we must rely on the aggregate level of expenses developed by each party to determine the net revenue gain or loss attributable [799] to diversion. No distinction is made by the parties even among the various types of traffic as to the costs of han-

[2] ICG and MILW did not submit any evidence as to the methodology they employed; we employed DRGW's methodology because its result appears to be an accurate representation of the costs of issue.

dling each type. However, we were able to develop the number of cars and gross revenue divertible by type of traffic. Diversions by class of traffic were calculated by subtracting expanded carloads and revenues of movements we found nondivertible from protestants' estimates of carload and revenue diversions for each class of traffic. This enabled us to develop the total gross revenue divertible for all types of traffic. We then applied the expenses as developed by each protestant and the resulting operating ratio to the newly developed gross revenue diverted. This permitted us to arrive at our estimate of the cost per car for handling diverted traffic for protestants SP, KCS, MKT and ATSF. Attachment 3 summarizes this development.

With the estimate of gross revenue diversion of approximately $132.7 million (Attachment 3 and 4) and cost of $80.0 million accepting, *arguendo*, each protestant's costing estimates, we were then in a position to estimate the cost to applicants of handling the diverted traffic.

Based on our estimate of gross and net revenues diverted for the four carriers SP, KCS, MKT and ATSF, we employed various criteria in our determination of the net revenue impact on applicants.

First, from Attachment 1 we calculated the relationship of diverted revenue to variable cost, i.e. diverted revenue/variable cost ratio (DRVCR), under which applicants claim they will move the diverted traffic. Applicants projected net revenue gains to approximate 33.5 million, with a DRVCR of approximately 79.0 percent. Since we have accepted applicants' costing methodology, we compared applicants' proposed DRVCR with those of the four protestants. SP in its costing of diverted traffic forecast DRVCR of 78.3 percent, KCS 78.6 percent, MKT 52.3 percent and ATSF 43.1 percent. In view of the fact that system average data has been primarily used by all parties of record, we find the projected operating ratio as

developed by applicants, SP and KCS to be a reasonable reflection of current operating conditions. MKT and ATSF's projected DRVCR of diverted traffic at 52.3 and 43.1 percent respectively have not been supported. We restated the DRVCR of MKT for reasons stated previously at 78.5 percent, a fair approximation considering the relative showings of the other three railroads.

After making the adjustment in costs outlined earlier for protestant ATSF, we applied the newly calculated ATSF DRVCR of 83.99 to the diverted revenue. Since we have accepted the costing methodology employed by applicants, and find protestants SP and KCS to have developed their costs at essentially the same DRVCR as applicants with virtually the same cost per diverted car ($866.91 for SP and $872.82 for KCS), we believe the experience as measured by these three carriers is an accurate reflection of the costs associated with the issue traffic. An approximate 78 to 79 percent DRVCR appears to accurately represent the operating characteristics which necessitate the costs which will be incurred. Operating results for the SP and ATSF are similar for this diverted traffic. Likewise the operating characteristics for KCS and the MKT are similar. Using the costs as developed by SP, KCS and ATSF and our restatement for MKT, the net revenue loss absorbed by the four protestants is approximately $25.6 million. (Attachment 3).

Continuing to base our methodologies on our Attachment 3 gross revenue estimate of $132.7 million, applying applicants proposed DRVCR to this estimate yields net revenue gains to them of approximately $27.9 million. (Attachment 4).

We then utilized a study [3] supplied by applicants which identified by type of traffic those specific movements by protesting railroad that applicants considered divertible. Without judging the merits of potential divertibility, we

[3] UP-5A/MP-5, Connection Report, page 180.

calculated the applicants' costs per car of [800] handling each of four protesting railroads alleged divertibles. This methodology yielded a DRVCR of 77.0 percent, with net revenue gains of approximately $30.5 million (Attachment 4) to applicants.

We calculated applicants' costs by developing, on a cumulative basis, the cost per car of handling this traffic. Using the study referred to above, we totalled all the cars deemed potentially divertible by applicants and developed a composite cost per car for handling all four protestantants' divertibles. This approach led to a DRVCR of 74.7 percent with net revenue gains to applicants of $33.5 million. (Attachment 4).

We conclude that our various tests have successfully compared the procedures implemented by the parties of record and have shown that the cost of handling diverted traffic is approximately the same for the applicants and the four protesting railroads combined. This figure lies between $99.2 million and $107.1 million. (Attachment 4) We note that the cost per car of $826 for handling this diverted traffic appears reasonable when compared with a cost per car of $873 for applicants handling of this traffic. Attachment 4 summarizes these results.

Heretofore our estimates have been confined to those four protesting carriers whose estimates of divertible revenue we did not accept. We have estimated the expenses of ICG and MILW to approximate a level comparable to the same 78.5 percent DRVCR as applied in Attachments 3 and 4. We continue with this methodology and conclusions derived therefrom inasmuch as ICG and MILW have not supplied any evidence on the record for determining the costs of handling diverted traffic. For protestant DRGW, we have employed the results of its traffic study which yielded an operating ratio of 69.4 percent for the traffic at issue.

Attachment 4 further points out the total impact of consolidation on applicants, giving effect to traffic diversions from seven protesting railroads. The private benefit to be derived by applicants as a result of net revenue gains from diversion is approximately $40 million. This is derived from the additional $52 million (Atachment 3) in divertible revenue attributable to DRGW, ICG and MILW. As stated earlier, this figure represents the estimates made by protestants. Costs of $37.6 million on a cumulative basis have been ascribed to these revenues; thus an additional net revenue gain (loss to protestants) of $14.4 million will accrue to applicants. (Attachment 3).

Attachment 4 shows that the total gross revenue attributable to diversion approximates $185 million. This compares with approximately $140-$145 million in associated expenses. It is from this relationship that we estimate the net revenue gain of applicants to be approximately $40 million based on the four examples shown in Attachment 4.

[801]

ATTACHMENT 1

Summary of Applicants Results of Rail Traffic C Diversion Studies and Non-Rail Traffic Study UP/MP/WP

		Rail	Non-rail	Total
UPRR:				
	Gross Revenue	$71,357,150	$23,133,563	$94,490,713
	Variable Cost	50,571,706	15,924,085	66,495,791
	Net Revenue	20,785,444	7,209,478	27,994,922
MPRR:				
	Gross Revenue	62,625,550	4,596,435	67,221,985
	Variable Cost	51,542,562	4,399,086	55,941,648
	Net Revenue	11,082,988	197,349	11,280,337
WPRR:				
	Gross Revenue	25,232,700	4,810,084	30,042,784
	Variable Cost	23,596,221	4,374,252	27,970,473
	Net Revenue	1,636,479	435,832	2,072,311
TOTAL:				
	Gross Revenue	159,215,400	32,540,082	191,755,482
	Variable Cost	125,710,489	24,697,423	150,407,912
	Net Revenue	33,504,911	7,842,659	41,347,570

ATTACHMENT 2

UP-MP-WP Consolidation
Traffic Revenue Changes
1979 dollars (millions)

Carrier	Applicants Estimate	Protestant Estimate	ICC Staff Estimate
ATSF	$(14.0)	$(64.2)	$(54.3)
BN-Frisco	(42.6)	[1](189.7)	
CNW	(8.4)	(25.2)	Settled
Conrail	4.2	Settled & Withdrew	
DRGW	(29.8)	(35.3)	[5](35.3)
ICG	(9.4)	(11.3)	[2 5](11.3)
KCS	(3.2)	[3](13.6)	(5.2)
Milwaukee	(1.1)	(5.4)	[5](5.4)
MKT	(14.3)	(23.5)	(18.8)
SP-SSW	(33.2)	(105.2)	(54.5)
TOTAL	[4] 105.0	[4] 258.5	[4] 184.8

[1] BN Impact study shows $189.7 million loss of coal revenue in 1985.

[2] ICG did not file any briefs.

[3] Traffic Study ($8.5 million) and Market Power Study ($5.1 million).

[4] Exclusive of BN/Frisco, CNW and Conrail.

[5] Accepted estimate of Protestant.

[802]

ATTACHMENT 3

Summary of Commission's restatement of protestants' costs of handling diverted traffic
(Dollars in Millions)

	Gross revenue	Variable expenses	Net revenue
SP	$54.5	$42.7	$11.8
KCS	5.2	4.1	1.1
MKT	18.8	14.8	4.0
ATSF	54.2	45.5	8.7
Sub Total	132.7	107.1	25.6
DRGW	35.3	24.5	10.8
ICG	11.3	8.9	2.4
MILW	5.4	4.2	1.2
Sub Total	52.0	37.6	14.4
Grand Total	184.7	144.7	40.0

ATTACHMENT 4

***Summary of Criteria for Determining Cost of Handling Diverted Traffic and Net Revenue Gain or Loss for 4 Protesting Carriers*[1]**
(Dollars in Millions)

	Applicants Estimate (all Protestants)	DRVCR Actual-SP, KCS, ATSF 78.5 - MKT	Applying Applicants OR	Cost Per Car Per Protestant	Composite Cost
Gross Revenue	$159.2	$132.7	$132.7	$132.7	$132.7
Variable Expenses	125.7	107.1	104.8	102.2	99.2
Net Revenue	33.5	25.6	27.9	30.5	33.5
Operating Ratio	78.96	80.66	78.96	76.98	74.74
Cars Diverted	223,580	120,079	120,079	120,079	120,079
Cost Per Car	$565.70	$891.67	$872.82	$850.99	$826.25
	Estimates for 7 protesting carriers[2]				
		DRVCR Actual-SP-KCS, ATSF, DRGW 78.5-MKT, ICG, MILW			
Gross Revenue	$159.2	$184.8	$184.8	$184.8	$184.8
Variable Expenses	125.7	144.7	145.9	143.0	140.0
Net Revenue	33.5	40.1	38.9	41.8	44.8
Operating Ratio	78.96	78.31	78.96	77.38	75.76
Cars Diverted	223,580	([3])	([3])	([3])	([3])
Cost Per Car	$565.70				

[1] SP, KCS, MKT, ATSF.

[2] Those 4 carriers above plus DRGW, ICG and MILW.

[3] Estimates of diverted cars not available for ICG and MILW.

[803]

ATTACHMENT 5

Changes in gross and net revenues due to rail traffic diversions

SP:	
Gross Revenue Gain [Loss]	$(54,538,537)
Variable Cost	42,700,413
Net Revenue Gain [Loss]	(11,838,124)
KCS:	
Gross Revenue Gain [Loss]	(5,241,691)
Variable Cost	4,122,744
Net Revenue Gain [Loss]	(1,118,947)
MKT:	
Gross Revenue Gain [Loss]	(18,796,178)
Variable Cost	14,755,000
Net Revenue Gain [Loss]	(4,041,178)
ATSF:	
Gross Revenue Gain [Loss]	(54,164,680)
Variable Cost	45,492,915
Net Revenue Gain [Loss]	(8,671,765)
DRGW:	
Gross Revenue Gain [Loss]	(35,344,712)
Variable Cost	24,527,593
Net Revenue Gain [Loss]	(10,817,119)
ICG:	
Gross Revenue Gain [Loss]	(11,259,200)
Variable Cost	8,838,472
Net Revenue Gain [Loss]	(2,420,728)
MILW:	
Gross Revenue Gain [Loss]	(5,448,438)
Variable Cost	4,277,024
Net Revenue Gain [Loss]	$(1,171,414)
Totals:	
Gross Revenue Gain [Loss]	$(184,793,436)
Variable Cost	144,714,161
Net Revenue Gain [Loss]	$(40,079,275)

APPENDIX J

Financial condition of the parties

This appendix sets forth financial information regarding the primary applicants and the protestant railroads. We have analyzed the financial ratios that we generally accept and use as criteria in determining the financial posture of a transportation entity. The ratios include the operating ratio, working capital ratio, long-term debt to total capital ratio, fixed charge coverage ratio, the rate of return on average shareholders' equity, the rate of return on net investment in rail property as defined in Ex Parte No. 416, and the dividend pay-out ratio, or, conversely, the internal capital retention ratio. These selected ratios demonstrate a carrier's earnings and operating performance, its capacity and ability to meet short-term and long-term liabilities, and the future growth and stability of its total operating viability.

[804] APPLICANTS

UPRR. An analysis of UPRR's income statements for each of the 3 years ended December 31, 1977, 1978 and 1979, shows profitable operations in every year. UPRR's operating revenues increased by $443 million between 1977 and 1979. This represents a 34 percent increase or an average annual increase of 11.3 percent. Operating expenses, however, increased by a greater percentage, rising over 54 percent in the same three year period or an average annual increase of 18 percent. UPRR enjoyed net income of $149.1 million in 1979, which was 28.3 percent improvement over the $116.3 million realized in 1977. UPRR continued to operate efficiently in 1979 as evidenced by its operating ratio of 85.8 percent and its fixed charge coverage of almost 5 times. Also in 1979, its debt due after one year decreased by $55.2 million from the $582.2 million at year-end 1978. The rates of return on average shareholders' equity and average net investment improved to 1979's 10.2 percent and 7.6 percent, and

averaged 9.7 and 7.4 percent, respectively, over the three year period 1977-1979. The dividend payout ratio fluctuated from a high of 56.6 percent to a low of 47.5 percent, and averaged 50.8 percent over the 3 year period. Long-term debt to total capital declined from its 1977 high of 30.0 percent to its 1979 low of 26.0 percent. The three-year average is 18.3 percent.

MPRR. MPRR's operating revenues increased by $355 million between 1977 and 1979. This represents a 33 percent increase or an average annual increase of 11.1 percent. Operating expenses, however, increased by a greater percentage, rising over 62 percent in the same three year period or an average annual increase of almost 21 percent. MPRR enjoyed net income of $110.0 million in 1979, which was a 1.1 percent improvement over the $108.9 million realized in 1977.

It's 3 year average operating ratio, 1977-1979, was a very favorable 81.2 percent. Its average rates of return on shareholders' equity and net investment over the same 3 year period were 16.5 percent and 8.7 percent, respectively. The dividend payout ratio increased from 19.7 percent in 1977 to 31.8 percent in 1979, an increase of 61.4 percent. MPRR's working capital ratio was 1.2 times in 1979, and averaged 1.26 times for the 3 year period while its long-term debt to total capital averaged 56.3 percent.

WPRR. In 1978, Newrail Company, Inc. purchased the WPRR. As a result several asset and equity accounts were significantly changed, distorting any meaningful analysis of WPRR's financial trends. For example, in 1978, a writedown of WPRR's assets caused a one-time non-operating loss of $110.1 million. However, in 1979 its operating revenues exceeded operating expenses resulting in an operating ratio of just under 98 percent. It also covered its fixed charges approximately 2 times and enjoyed net income of $4.5 million.

PROTESTANTS

Atchison, Topeka & Santa Fe. ATSF's operating revenues increased by $524 million between 1977 and 1979. This represented a 38.8 percent increase or an average annual increase of 12.9 percent. Operating expenses increased by a greater rate, however, rising by more than 54.2 percent over the same period for an average annual increase of 18.1 percent. ATSF enjoyed net income of $128.0 million in 1979, which was a 70 percent improvement over the $75.3 million realized in 1977. Its 3 year average operating ratio, 1977-1979, was 87.9 percent. Its average rates of return on shareholders' equity and net investment over the same period were 6.9 percent and 4.9 percent, respectively.

Kansas City Southern. KCS's operating revenues for 1979 were $221 million and its total operating expenses were $197 million for a favorable operating ratio of 89 percent. Its 3 year average operating ratio, 1977-1979, was 89.6 percent. Net income for 1979 was $17.8 million as compared with $14.4 million in 1978 and $8.4 million in 1977.

[805] Rates of return on equity for the KCS averaged 10.3 percent for the 3 year period 1977-1979 and 6.1 percent for the average return on investment. Its dividend payout ratio increased from 8.2 percent in 1977 to 44.4 percent in 1979, an increase of 441 percent. KCS's working capital ratio was 0.9 times in 1979, and averaged 0.9 times for the same 3 year period while its long-term debt to total capital over the same period averaged 45.4 percent and its fixed charge coverage averaged approximately 3.5 times.

St. Louis Southwestern. SLS's operating revenues for 1979 were $261 million and its total operating expenses were $218 million for a favorable operating ratio of 83.6 percent. Its 3 year average operating ratio, 1977-1979, was 81.9 percent. It enjoyed net income of $36.8 million

in 1979 as compared with $32.9 million in 1978 and $30.8 million in 1977.

Rates of return on equity for SLS averaged 11.4 percent for the same 3 year period and 7.6 percent for the average return on investment. Its dividend payout ratio declined from 100.9 percent in 1977 to 49.4 percent in 1979, a decrease of 50.9 percent. SLS's working capital ratio was 1.6 times in 1979, and averaged 1.9 times for the same 3 year period. Its long-term debt to total capital averaged 32.1 percent and its fixed charge coverage averaged approximately 4.6 times.

Denver & Rio Grande Western Railway Company. DRGW's net income for 1979 totaled $27.8 million against $24.5 million in 1978 and $19.5 million in 1977. Total operating revenues for the 3 year period grew at an average annual rate of 19.7 percent while total operating expenses averaged a growth of 26.5 percent. This is reflected in DRGW's operating ratio which increased in 1979 to 84.2 percent from 82.5 percent and 75.6 percent in 1978 and 1977, respectively.

Its rates of return on equity averaged 11.1 percent for the 3 year period 1977-1979 and its rate of return on investment averaged 8.0 percent for the same period. DRGW's working capital ratio was 1.1 times in 1979, and 1.4 times in each of the years 1978 and 1977. Its long-term debt to total capital averaged 26.1 percent and its fixed charge coverage averaged approximately 7.7 times.

Southern Pacific Transportation Company. SPTC's 1979 operating expenses of $188.2 million were high relative to its operating revenues that year of $193.1 million resulting in an operating ratio of 97.5 percent. This high operating ratio is reflected in the relatively low rates of return on equity and investment of 3.6 and 1.6 percent, respectively. These rates of return averaged 4.0 and 2.0 percent, for the 3-year period 1977-1979, respec-

tively. Its working capital ratio was only 0.8 times in 1979 and averaged only 0.9 times for the three year period 1977-1979. Its dividend payout ratio showed a great deal of movement over 3 years rising from 80.5 percent in 1977 to 99.2 percent in 1978, then declining to 60.5 percent in 1979. Dividends decreased by almost $30 million over these years, while net income fluctuated between $79.6 million in 1977 and $56.5 million in 1979, a decrease of some $23 million. The debt to total capital ratio averaged a moderate 35.4 percent over the three year period and its fixed charge coverage averaged 2.1 times.

Missouri-Kansas-Texas Railroad Company. MKT's operating revenues for 1979 were $165.9 million and its total operating expenses were $163.2 million for an operating ratio of 98.3 percent. Net income for 1979 was $4.5 million as compared with $2.4 million in 1978 and a deficit of $(5.6) million in 1977.

Rates of return on equity for the MKT were nonexistent for the 3 year period 1977-1979. For the same 3 years its rate of return on investment averaged 4.1 percent. No cash dividends were paid over this period of time. Its long-term debt to total capital ratio exceeded 100 percent in each of the 3 years and its fixed charge covered averaged only 0.6 percent for the same period.

Burlington Northern, Inc. BN's net income for 1979 totaled $175.2 million against $113.6 million in 1978 and $74.9 million in 1977. Total operating revenues for the 3-year period [806] grew at an average annual rate of almost 21 percent while total operating expenses averaged a growth of approximately 30 percent.

Its rate of return on equity averaged 6.2 percent for the 3 year period 1977-1979 and its rate of return on investment averaged 3.1 percent for the same period. BN's working capital ratio averaged approximately 1.2 times for each of the three years; its long-term debt total capital averaged 32.8 percent and its fixed charge coverage averaged approximately 2.6 times.

SUPPLEMENTAL FINANCIAL ANALYSIS 1981 VS. 1979

APPLICANTS

UPRR. Operating revenues for 1981 continued to be relatively high in comparison to operating expenses as evidenced by a favorable operating ratio of 86.1 percent, a fraction higher than its operating ratio in 1979. Net income for 1981 was 12 percent higher than 1979's and even though its 1981 working capital level improved from 1979 it is still low. Its fixed charge coverage in 1981 remained an adequate 4.8 times and the level of its capital structure ratio is quite sound at 24.9 percent. In addition to maintaining a sound financial structure in 1981, UPRR continues to maintain a relatively high dividend payout ratio. Overall, its performance in 1981 showed improvement over 1979.

MPRR. MPRR's operating revenues for 1981 are high in relation to operating expenses. This produced an operating ratio of 88.0 percent which is favorable but still 1 percent higher than it was in 1979. Net income for 1981 increased by $38 million over the 3 year period or nearly 35 percent. Its fixed charge coverage of 3.4 times was as adequate in 1981 as it was in 1979 and its 1981 capital structure level, though still high, is almost 3 percentage points lower than it was in 1979.

WPRR. WPRR's 1981 operating expenses exceeded its operating revenues by almost $6 million, thus producing an operating ratio of 103 percent or 5 percentage points higher than it was in 1979. Despite the rise in 1981 net income over 1979, the current ratio, the fixed charge coverage and the capital structure ratio improved only slightly.

PROTESTANTS

ATSF. ATSF's operating revenues for 1981 are lower in relation to operating expenses than they were in 1979; thus the operating ratio rose to almost 94 percent or ap-

proximately 3 percentage points higher than it was in 1979. Net income declined by over $17 million during this period. Although its 1981 dividend payout ratio was high, it was understandably lower than it was in 1979. Fixed charge coverage declined to 3.0 times over the period but still remains adequate and its capital structure level still remains sound at 27.3 percent.

KCS. KCS's 1981 operating revenues continued to be high in comparison to operating expenses. As a result its operating ratio was a very favorable 88.6 percent, only a fraction lower than the 89 percent attained in 1979. Its net income rose almost $9 million over the 3-year period but its dividend payout ratio declined by almost 4 percentage points. Its working capital ratio remained the same low 0.9 times while its level of capital structure and fixed charge coverage remained nearly the same.

SLS. SLS's operating revenues for 1981 are lower in relation to operating expenses than they were in 1979; thus the operating ratio rose to 86.3 percent or almost 3 percentage points higher than it was in 1979. Net income for 1981 increased $24 million over 1979, a 66 percent increase. Even though its net income more than doubled over the 3 year period its dividend payout ratio declined from 49.4 percent to 29.8 percent or almost 20 percent-
[807] age points. Its 1981 working capital ratio fell slightly from 1979, but the level of its capital structure improved by almost 10 percentage points and its coverage of fixed charges nearly doubled, going from 4.8 to 8.1 times.

DRGW. DRGW's operating revenues for 1981 are lower in relation to operating expenses than they were in 1979 and, as a result, the operating ratio rose from 84.2 percent to 85.4 percent. Net income rose $2.6 million, but its dividend payout ratio declined from 34.4 percent to 29.9 percent, a drop of almost 5 percentage points. Its 1981 working capital ratio, capital structure level, and

fixed charge coverage remained almost the same as those in 1979.

SP. SP's operating ratio worsened in 1981, rising to 99.3 percent signifying poor costs to revenue relationship. Net income declined from $56.5 million in 1979 to $47.8 million in 1981, or almost $9 million. It failed to pay dividends in 1981 whereas it paid out 60.5 percent in 1979. Its working capital ratio for 1981 was a low 0.8 times the same as it was in 1979. Its capital structure level rose from 38.0 percent in 1979 to 41.3 percent in 1981 and its fixed charge coverage dropped from 2.0 times in 1979 to 1.6 times in 1981.

MKT. MKT's 1981 operating revenues are higher in relation to operating expenses than they were in 1979. As a result the operating ratio improved to 92.7 percent. Although net income rose from $4.5 million in 1979, to $7.7 million in 1981, MKT did not pay dividends. Its fixed charge coverage improved to 1.5 times, but its working capital ratio remained a low 0.8 times. Its capital structure level remained poor, but improved from 125.0 percent in 1979 to 113.2 percent in 1981.

BN. BN's operating ratio improved in 1981, declining to 92.0 percent signifying a more favorable cost to revenue relationship than it had in 1979. Net income rose by almost $93 million and it paid out $57 million more in dividends than it did in 1979. Its 1981 working capital ratio, capital structure level and fixed charge coverage improved over those of 1979.

ICG. ICG's operating ratio worsened in 1981, rising to 101.8 percent from 101.0 percent in 1980. Its net income deficit dropped from $27.2 million in 1980 to $5.9 million in 1981. Its working capital ratio rose from less than 1 in 1980 to 1.06 times in 1981. Its capital structure ratio rose from 38.7 percent in 1980 to 39.6 percent in 1981, while its fixed charge coverage increased from 0.41 times to 0.90 times. Overall, its performance in 1981 showed improvement over 1980.

ICG did not file a brief in support of its opposition in this case.

MILW. Milwaukee's operating revenues for 1981 were $404.4 million and its operating expenses were $477.9 million. This produced an operating ratio of 118.2 percent which was 7.2 percentage points better than it was in 1980. 1981 net income was $193 million as compared to a $206 million net income deficit suffered in 1980. Its 1981 working capital ratio improved from 1980 but is still below 1. Its 1981 capital structure level was unsound at 86 percent but this was an improvement over the 100 percent level maintained in 1980. Overall, its 1981 performance was an improvement over 1980.

On May 24, 1982, Milwaukee signed a letter of intent to be purchased by Grand Trunk Corporation (GTC), a unit of Canadian National Railway. GTC would acquire the Milwaukee stock and has agreed to assume about $250 million in debts and obligations of the railroad's estate. The estate would keep possession of Milwaukee Land Company and some other assets. These would be used to satisfy claims of the estate's creditors and shareholders. The Milwaukee and GTC have recently notified the Commission that the Milwaukee Road's amended plan of reorganization will be based on GTC's proposed control of the bankrupt road. In addition, the railroads stated that the amended plan would be filed no later than February 1983, and will replace a revised plan of reorganization submitted in September 1981. On August 17, 1982, a stock acquisition agreement was executed by the officers of GTC and the Milwaukee. This agreement will require both reorganization court and Commission approval.

[808]

Union Pacific Railroad Company

	1981	1980	1979	1978	1977
Revenue, expense and income items			*($ in Thousands)*		
Total Railway Operating Revenues	$2,100,793	$2,008,052	$1,742,294	$1,491,315	$1,299,216
Total Railway Operating Expenses	1,808,443	1,731,709	1,495,238	1,238,947	970,337
Net Revenue From Railway Operations	292,350	271,343	247,056	252,368	328,879
Income Available For Fixed Charges	310,022	287,929	257,657	258,492	161,995
Fixed Charges	64,431	65,646	52,330	44,222	45,733
Income Taxes	(40,567)	12,625	13,325	56,154	21,368
Provision For Deferred Income Taxes	118,790	44,920	42,860	16,315	39,697
Extraordinary Items-Net and Accounting Changes					
Net Income	167,368	164,738	149,142	141,801	116,262
Cash Dividends Paid	72,749	72,075	72,075	67,366	65,795
Net Railway Operating Income	214,407	214,351	190,818	179,842	149,754
Condensed financial position					
Cash	6,954	7,182	6,318	7,637	14,123
Working Funds & Temporary Cash Investments	303	58	58	58	58
Materials and Supplies	125,537	116,663	111,344	69,249	58,741
Total Current Assets	467,513	419,525	387,433	315,695	254,030
Transportation Property-Net	2,925,253	2,916,117	2,661,460	2,468,616	2,334,271
Total Assets	3,517,183	3,454,102	3,165,337	2,899,926	2,804,070
Total Current Liabilities	499,295	657,907	541,569	338,381	353,852
Long-Term Debt Due After One Year	559,855	554,423	526,978	582,160	576,435
Total Shareholders' Equity	1,686,301	1,591,681	1,499,018	1,421,977	1,347,542
Total Liabilities and Shareholders' Equity	3,517,183	3,454,102	3,165,337	2,899,926	2,804,070
Selected financial ratios					
Operating Ratio a	86.1%	86.5%	85.8%	83.1%	74.7%
Working Capital Ratio b	0.94X	0.64X	0.72X	0.93X	0.72X
Debt To Total Capital c	24.9%	25.8%	26.0%	29.0%	30.0%
Fixed Charge Coverage d	4.8X	4.4X	4.9X	5.8X	3.5X
Dividend Payout Ratio e	43.5%	43.8%	48.3%	47.5%	56.6%
Return on Equity (ROE) f	10.2%	10.7%	10.2%	10.2%	8.8%
Return on Net Investment (ROI) g	7.4%	7.8%	7.6%	7.8%	6.8%

a Railway Operating Expenses/Railway Operating Revenues.

b Current Assets/Current Liabilities.

c Long-Term Debt/(Long-Term Debt & Shareholders' Equity).

d Income Available For Fixed Charges/Fixed and Contingent Charges.

e Cash Dividends Paid/Net Income.

f Net Income/Shareholders' Equity.

g Net Railway Operating Income/Net Investment In Rail Property As Defined In Ex Parte No. 416.

[809]

Missouri Pacific Railroad Company

	1981	1980	1979	1978	1977
Revenue, expense and income items			*($ in Thousands)*		
Total Railway Operating Revenues	$1,887,660	$1,690,496	$1,418,727	$1,198,064	$1,064,028
Total Railway Operating Expenses	1,660,169	1,479,904	1,234,979	1,019,494	760,852
Net Revenue From Railway Operations	227,491	210,592	183,748	178,570	303,176
Income Available For Fixed Charges	293,178	253,924	211,785	202,969	158,241
Fixed Charges	86,272	74,199	58,809	49,677	39,546
Income Taxes	(74,551)	17,572	7,200	28,635	(4,042)
Provision For Deferred Income Taxes	123,756	29,365	26,062	13,790	10,628
Extraordinary Items-Net and Accounting Changes					
Net Income	148,323	123,388	110,026	101,189	108,882
Cash Dividends Paid	41,000	37,000	35,000	28,065	21,412
Net Railway Operating Income	178,502	163,987	150,236	135,676	134,776
Condensed financial position					
Cash	19,289	24,085	21,127	17,440	17,170
Working Funds & Temporary Cash Investments	205,406	182,214	106,397	167,061	127,174
Materials and Supplies	67,198	60,300	70,576	52,129	44,171
Total Current Assets	566,428	475,949	397,433	399,992	332,313
Transportation Property-Net	2,221,213	2,020,125	1,817,981	1,634,332	1,410,467
Total Assets	2,956,992	2,681,456	2,365,628	2,159,925	1,918,362
Total Current Liabilities	426,114	411,623	321,979	309,705	249,263
Long-Term Debt Due After One Year	1,093,554	1,078,854	979,409	890,096	802,831
Total Shareholders' Equity	956,621	849,298	762,910	687,884	619,916
Total Liabilities and Shareholders' Equity	2,956,992	2,681,456	2,365,628	2,159,925	1,918,362
Selected financial ratios					
Operating Ratio a	88.0%	87.5%	87.0%	85.1%	71.5%
Working Capital Ratio b	1.3X	1.2X	1.2X	1.3X	1.3X
Debt To Total Capital c	53.3%	56.0%	56.2%	56.4%	56.4%
Fixed Charge Coverage d	3.4X	3.4X	3.6X	4.1X	4.0X
Dividend Payout Ratio e	27.6%	30.0%	31.8%	27.7%	19.7%
Return on Equity (ROE) f	16.4%	15.3%	15.2%	15.5%	18.9%
Return on Net Investment (ROI) g	8.0%	8.1%	8.4%	8.4%	9.4%

a Railway Operating Expenses/Railway Operating Revenues.

b Current Assets/Current Liabilities.

c Long-Term Debt/(Long-Term Debt & Shareholders' Equity).

d Income Available For Fixed Charges/Fixed and Contingent Charges.

e Cash Dividends Paid/Net Income.

f Net Income/Shareholders' Equity.

g Net Railway Operating Income/Net Investment In Rail Property As Defined In Ex Parte No. 416.

[810]

Western Pacific Railroad Company

	1981	1980	1979	1978	1977
Revenue, expense and income items			*($ in Thousands)*		
Total Railway Operating Revenues	$188,250	$185,013	$166,955	$144,228	$127,237
Total Railway Operating Expenses	193,917	181,094	163,430	135,407	108,353
Net Revenue From Railway Operations	(5,667)	3,919	3,525	8,821	18,884
Income Available For Fixed Charges	24,057	15,609	12,118	11,659	9,507
Fixed Charges	10,091	8,543	6,943	5,403	4,437
Income Taxes	249	939	483	369	.....
Provision For Deferred Income Taxes	4,464	110	44	185	(385)
Extraordinary Items-Net and Accounting Changes	.....	.....	(516)	(115,561)	.....
Net Income (Before Extraordinary Items)	9,132	5,858	4,450	5,457	4,814
Cash Dividends Paid	.....	.....	.....	2,400	3,000
Net Railway Operating Income	(10,380)	2,870	2,998	8,267	7,971
Condensed financial position					
Cash	(1,521)	690	1,847	155	137
Working Funds & Temporary Cash Investments	41,457	16,802	5,724	15,447	19,250
Materials and Supplies	9,740	9,038	8,058	5,365	4,958
Total Current Assets	90,934	73,792	52,902	51,483	50,035
Transportation Property-Net	98,405	83,453	75,768	184,174	171,840
Total Assets	202,205	168,841	145,693	127,909	246,752
Total Current Liabilities	64,268	56,581	46,597	45,680	39,823
Long-Term Debt Due After One Year	88,762	75,101	72,546	66,472	58,788
Total Shareholders' Equity	33,049	23,892	18,034	1,694	124,198
Total Liabilities and Shareholders' Equity	202,205	168,841	145,693	127,909	246,752
Selected financial ratios					
Operating Ratio a	103.0%	97.9%	97.9%	93.9%	85.2%
Working Capital Ratio b	1.4X	1.3X	1.1X	1.1X	1.3X
Debt To Total Capital c	72.9%	75.9%	80.1%	85.0%	32.1%
Fixed Charge Coverage d	2.4X	1.8X	1.8X	2.2X	2.1X
Dividend Payout Ratio e	.....	.....	.....	44.0%	62.3%
Return on Equity (ROE) f	32.1%	27.9%	24.7%	4.6%	3.9%
Return on Net Investment (ROI) g	(10.1%)	3.2%	3.4%	4.4%	4.4%

a Railway Operating Expenses/Railway Operating Revenues.

b Current Assets/Current Liabilities.

c Long-Term Debt/ (Long-Term Debt & Shareholders' Equity).

d Income Available For Fixed Charges/Fixed and Contingent Charges.

e Cash Dividends Paid/Net Income.

f Net Income/Shareholders' Equity.

g Net Railway Operating Income/Net Investment In Rail Property As Defined In Ex Parte No. 416.

[811]

Atchison, Topeka & Santa Fe Railway Company

	1981	1980	1979	1978	1977
Revenue, expense and income items			*($ in Thousands)*		
Total Railway Operating Revenues	$2,370,775	$2,204,483	$1,872,619	$1,530,839	$1,349,005
Total Railway Operating Expenses	2,219,928	1,976,601	1,705,303	1,388,054	1,105,560
Net Revenue From Railway Operations	150,847	227,882	167,316	142,785	243,445
Income Available For Fixed Charges	188,952	263,237	197,130	160,764	108,640
Fixed Charges	63,478	48,853	38,512	35,173	32,079
Income Taxes	(2,232)	16,636	7,927	3,606	(943)
Provision For Deferred Income Taxes	16,121	33,784	21,464	28,211	12,378
Extraordinary Items-Net and Accounting Changes					
Net Income	110,567	162,930	128,036	92,539	75,289
Cash Dividends Paid	34,000	60,000	43,000	36,000	36,000
Net Railway Operating Income	136,937	177,435	137,885	110,929	80,775
Condensed financial position					
Cash	(4,790)	8,378	15,885	10,517	8,565
Working Funds & Temporary Cash Investments	45,686	13,376	56,208	118,952	98,779
Materials and Supplies	125,154	140,001	102,610	79,418	78,368
Total Current Assets	488,641	494,994	443,115	416,086	350,742
Transportation Property-Net	2,706,846	2,527,248	2,319,671	2,109,377	2,000,120
Total Assets	3,298,655	3,160,173	2,869,037	2,632,033	2,478,769
Total Current Liabilities	478,170	462,225	411,012	314,911	270,242
Long-Term Debt Due After One Year	637,886	629,357	534,233	504,495	492,955
Total Shareholders' Equity	1,699,284	1,622,717	1,519,787	1,434,520	1,378,135
Total Liabilities and Shareholders' Equity	3,298,655	3,160,173	2,869,037	2,632,033	2,478,769
Selected financial ratios					
Operating Ratio a	93.6%	89.7%	91.1%	90.7%	82.0%
Working Capital Ratio b	1.0X	1.1X	1.1X	1.3X	1.3X
Debt To Total Capital c	27.3%	27.9%	26.0%	26.0%	26.3%
Fixed Charge Coverage d	3.0X	5.4X	5.1X	4.6X	3.4X
Dividend Payout Ratio e	30.8%	36.8%	33.6%	39.0%	47.9%
Return on Equity (ROE) f	6.7%	10.4%	8.8%	6.7%	5.4%
Return on Net Investment (ROI) g	5.0%	7.0%	5.9%	5.0%	3.9%

a Railway Operating Expenses/Railway Operating Revenues.

b Current Assets/Current Liabilities.

c Long-Term Debt/(Long-Term Debt & Shareholders' Equity).

d Income Available For Fixed Charges/Fixed and Contingent Charges.

e Cash Dividends Paid/Net Income.

f Net Income/Shareholders' Equity.

g Net Railway Operating Income/Net Investment In Rail Property As Defined In Ex Parte No. 416.

[812]

Kansas City Southern

	1981	1980	1979	1978	1977
Revenue, expense and income items			*($ in Thousands)*		
Total Railway Operating Revenues	$310,128	$277,158	$221,415	$192,150	$163,375
Total Railway Operating Expenses	274,709	244,320	197,120	170,291	149,241
Net Revenue From Railway Operations	35,419	32,838	24,295	21,859	14,134
Income Available For Fixed Charges	51,025	43,055	32,550	26,648	18,423
Fixed Charges	17,228	12,056	9,063	7,165	5,864
Income Taxes	(423)	5,543	1,872	607	(212)
Provision For Deferred Income Taxes	7,578	1,869	3,809	4,494	4,375
Extraordinary Items-Net and Accounting Changes					
Net Income	26,642	23,587	17,806	14,382	8,396
Cash Dividends Paid	10,792	9,805	7,904	4,768	689
Net Railway Operating Income	28,403	25,563	18,739	18,096	11,342
Condensed financial position					
Cash	(1,831)	520	920	(3,460)	(2,215)
Working Funds & Temporary Cash Investments	18,197	11,231	4,391	11,824	5,725
Materials and Supplies	22,655	25,744	21,080	13,743	14,149
Total Current Assets	81,392	79,935	54,027	46,522	34,598
Transportation Property-Net	363,198	334,020	291,677	259,989	230,308
Total Assets	478,789	445,059	388,600	338,870	293,964
Total Current Liabilities	86,890	83,546	61,059	49,726	40,808
Long-Term Debt Due After One Year	159,618	149,867	131,104	112,708	92,906
Total Shareholders' Equity	173,197	157,353	143,571	133,669	124,055
Total Liabilities and Shareholders' Equity	478,789	445,059	388,600	338,870	293,964
Selected financial ratios					
Operating Ratio a	88.6%	88.2%	89.0%	88.6%	91.3%
Working Capital Ratio b	0.9X	0.9X	0.9X	0.9X	0.8X
Debt To Total Capital c	48.0%	48.0%	47.7%	45.7%	42.8%
Fixed Charge Coverage d	3.0X	3.6X	3.6X	3.7X	3.1X
Dividend Payout Ratio e	40.5%	41.6%	44.4%	33.2%	8.2%
Return on Equity (ROE) f	16.1%	15.7%	12.9%	11.2%	7.0%
Return on Net Investment (ROI) g	7.6%	7.6%	6.6%	7.1%	4.6%

a Railway Operating Expenses/Railway Operating Revenues.

b Current Assets/Current Liabilities.

c Long-Term Debt/(Long-Term Debt & Shareholders' Equity).

d Income Available For Fixed Charges/Fixed and Contingent Charges.

e Cash Dividends Paid/Net Income.

f Net Income/Shareholders' Equity.

g Net Railway Operating Income/Net Investment In Rail Property As Defined In Ex Parte No. 416.

[813]

St. Louis Southwestern Railway Company

	1981	1980	1979	1978	1977
Revenue, expense and income items			*($ in Thousands)*		
Total Railway Operating Revenues	$388,875	$303,859	$261,102	$226,338	$216,250
Total Railway Operating Expenses	335,578	266,356	218,195	189,018	170,008
Net Revenue From Railway Operations	53,297	37,503	42,907	37,320	46,242
Income Available For Fixed Charges	102,630	45,489	55,731	47,405	40,353
Fixed Charges	12,606	14,587	11,611	9,905	9,573
Income Taxes	(41)	(65)	1,571	2,110	1,709
Provision For Deferred Income Taxes	29,064	6,034	5,772	2,492	14,439
Extraordinary Items-Net and Accounting Changes					
Net Income	61,001	24,933	36,777	32,898	30,780
Cash Dividends Paid	18,160	18,176	18,175	35,356	31,061
Net Railway Operating Income	24,274	31,539	35,567	32,719	32,954
Condensed financial position					
Cash	2,023	2,996	2,783	6,914	2,330
Working Funds & Temporary Cash Investments	35,106	31,263	52,398	83,223	75,526
Materials and Supplies	24,032	18,517	11,094	4,064	5,614
Total Current Assets	138,255	131,231	156,965	145,587	124,612
Transportation Property-Net	638,869	566,475	487,797	416,646	415,883
Total Assets	838,881	766,227	719,062	622,698	585,339
Total Current Liabilities	109,154	116,474	96,481	78,080	60,389
Long-Term Debt Due After One Year	155,683	170,883	185,577	126,651	116,956
Total Shareholders' Equity	401,813	340,477	309,431	290,832	293,290
Total Liabilities and Shareholders' Equity	838,851	766,227	719,062	622,698	585,339
Selected financial ratios					
Operating Ratio a	86.3%	87.7%	83.6%	83.5%	78.6%
Working Capital Ratio b	1.3X	1.1X	1.6X	1.9X	2.1X
Debt To Total Capital c	27.9%	33.4%	37.5%	30.3%	28.5%
Fixed Charge Coverage d	8.1X	3.1X	4.8X	4.8X	4.2X
Dividend Payout Ratio e	29.8%	72.9%	49.4%	107.5%	100.9%
Return on Equity (ROE) f	16.4%	7.7%	12.3%	11.3%	10.5%
Return on Net Investment (ROI) g	3.9%	5.8%	7.5%	7.5%	7.7%

a Railway Operating Expenses/Railway Operating Revenues.

b Current Assets/Current Liabilities.

c Long-Term Debt/(Long-Term Debt & Shareholders' Equity).

d Income Available For Fixed Chargee/Fixed and Contingent Charges.

e Cash Dividends Paid/Net Income.

f Net Income/Shareholders' Equity.

g Net Railway Operating Income/Net Investment In Rail Property As Defined In Ex Parte No. 416.

[814]

Denver & Rio Grande Western Railway Company

	1981	1980	1979	1978	1977
Revenue, expense and income items			*($ in Thousands)*		
Total Railway Operating Revenues	$335,091	$287,474	$257,484	$218,016	$179,747
Total Railway Operating Expenses	286,231	241,157	216,877	179,755	135,841
Net Revenue From Railway Operations	48,860	46,317	40,607	38,261	43,906
Income Available For Fixed Charges	56,324	47,990	45,569	42,206	24,432
Fixed Charges	7,736	7,187	5,846	4,414	4,335
Income Taxes	1,262	10,444	8,794	11,213	4,534
Provision For Deferred Income Taxes	16,954	2,846	3,074	1,561	1,922
Extraordinary Items-Net and Accounting Changes					
Net Income	30,295	27,372	27,670	24,501	19,493
Cash Dividends Paid	9,070	9,465	9,516	9,232	8,669
Net Railway Operating Income	30,647	33,023	28,739	25,480	21,170
Condensed financial position					
Cash	5,356	5,473	8,064	3,707	2,692
Working Funds & Temporary Cash Investments	47,419	10,971	100	19,984	11,977
Materials and Supplies	31,655	28,646	19,504	12,117	13,625
Total Current Assets	134,112	93,939	71,327	76,925	59,885
Transportation Property-Net	352,653	350,060	347,042	301,885	297,211
Total Assets	506,299	464,387	441,650	490,470	378,159
Total Current Liabilities	76,866	70,561	63,760	56,603	42,729
Long-Term Debt Due After One Year	80,158	80,920	79,982	77,129	77,565
Total Shareholders' Equity	279,986	259,754	241,728	220,598	205,247
Total Liabilities and Shareholders' Equity	506,299	464,387	441,650	409,470	378,159
Selected financial ratios					
Operating Ratio a	85.4%	83.9%	84.2%	82.5%	75.6%
Working Capital Ratio b	1.7X	1.3X	1.1X	1.4X	1.4X
Debt To Total Capital c	22.3%	23.8%	24.9%	25.9%	27.4%
Fixed Charge Coverage d	7.3X	6.7X	7.8X	9.6X	5.6X
Dividend Payout Ratio e	29.9%	34.6%	34.4%	37.7%	44.5%
Return on Equity (ROE) f	11.2%	11.0%	12.0%	11.5%	9.8%
Return on Net Investment (ROI) g	8.1%	8.9%	8.6%	8.3%	7.1%

a Railway Operating Expenses/Railway Operating Revenues.

b Current Assets/Current Liabilities.

c Long-Term Debt/(Long-Term Debt & Shareholders' Equity).

d Income Available For Fixed Charges/Fixed and Contingent Charges.

e Cash Dividends Paid/Net Income.

f Net Income/Shareholders' Equity.

g Net Railway Operating Income/Net Investment In Rail Property As Defined In Ex Parte No. 416.

[815]

Southern Pacific Transportation Company

	1981	1980	1979	1978	1977
Revenue, expense and income items			*($ in Thousands)*		
Total Railway Operating Revenues	$2,262,820	$2,050,049	$1,930,524	$1,653,884	$1,560,444
Total Railway Operating Expenses	2,246,115	2,003,045	1,882,133	1,616,275	1,207,760
Net Revenue From Railway Operations	16,705	47,004	48,391	37,609	352,684
Income Available For Fixed Charges	132,086	142,428	137,700	110,554	133,636
Fixed Charges	80,782	87,471	68,470	59,613	54,050
Income Taxes	(48)	538	(2,264)	(63)	(130)
Provision For Deferred Income Taxes	3,508	(18,393)	14,981	1,635	21,791
Extraordinary Items-Net and Accounting Changes					
Net Income	47,844	72,812	56,513	49,369	79,586
Cash Dividends Paid			34,181	48,961	64,054
Net Railway Operating Income	12,830	65,967	35,634	36,001	53,725
Condensed financial position					
Cash	16,741	21,145	24,271	6,548	10,393
Working Funds & Temporary Cash Investments	68,161	43,942	35,350	154,178	201,515
Materials and Supplies	89,963	69,837	82,602	55,385	41,214
Total Current Assets	496,707	473,020	471,440	474,007	442,251
Transportation Property-Net	2,663,162	2,683,508	2,519,063	2,237,796	2,099,089
Total Assets	3,789,564	3,831,289	3,665,641	3,382,714	3,217,564
Total Current Liabilities	630,060	615,064	575,225	487,445	392,569
Long-Term Debt Due After One Year	1,184,817	1,043,374	965,878	836,994	777,053
Total Shareholders' Equity	1,685,390	1,645,747	1,577,239	1,555,069	1,558,383
Total Liabilities and Shareholders' Equity	3,789,564	3,831,289	3,665,641	3,382,714	3,217,564
Selected financial ratios					
Operating Ratio a	99.3%	97.7%	97.5%	97.7%	77.4%
Working Capital Ratio b	0.8X	0.8X	0.8X	0.9X	1.1X
Debt To Total Capital c	41.3%	38.8%	38.0%	35.0%	33.3%
Fixed Charge Coverage d	1.6X	1.6X	2.0X	1.9X	2.5X
Dividend Payout Ratio e			60.5%	99.2%	80.5%
Return on Equity (ROE) f	2.9%	4.5%	3.6%	3.2%	5.1%
Return on Net Investment (ROI) g	0.5%	2.6%	1.6%	1.7%	2.7%

a Railway Operating Expenses/Railway Operating Revenues.

b Current Assets/Current Liabilities.

c Long-Term Debt/(Long-Term Debt & Shareholders' Equity).

d Income Available For Fixed Charges/Fixed and Contingent Charges.

e Cash Dividends Paid/Net Income.

f Net Income/Shareholders' Equity.

g Net Railway Operating Income/Net Investment In Rail Property As Defined In Ex Parte No. 416.

[816]

Missouri-Kansas-Texas Railroad Company

	1981	1980	1979	1978	1977
Revenue, expense and income items			*($ in Thousands)*		
Total Railway Operating Revenues	$268,250	$220,917	$166,086	$135,676	$117,186
Total Railway Operating Expenses	248,747	210,522	163,189	134,805	90,127
Net Revenue From Railway Operations	19,503	10,395	2,897	871	27,059
Income Available For Fixed Charges	23,480	14,762	6,376	2,779	3,454
Fixed Charges	15,711	11,164	8,299	6,474	5,247
Income Taxes	(6,562)	(247)	(6,390)	(6,100)	(3,000)
Provision For Deferred Income Taxes					
Extraordinary Items-Net and Accounting Changes	6,657				
Net Income	7,674	3,351	4,467	2,405	(5,572)
Cash Dividends Paid					
Net Railway Operating Income	26,692	10,602	9,278	6,958	2,124
Condensed financial position					
Cash	(1,710)	(2,890)	451	(1,051)	286
Working Funds & Temporary Cash Investments	6,940	8,000	1,500	1,000	200
Materials and Supplies	20,888	19,678	13,582	9,003	9,030
Total Current Assets	63,571	54,982	45,813	30,897	21,172
Transportation Property-Net	263,776	225,336	204,868	179,993	168,332
Total Assets	347,472	300,651	268,060	227,546	205,464
Total Current Liabilities	80,555	65,062	54,463	39,911	30,236
Long-Term Debt Due After One Year	194,772	174,940	154,375	134,606	123,169
Total Shareholders' Equity	(22,653)	(28,918)	(30,858)	(33,916)	(34,912)
Total Liabilities and Shareholders' Equity	347,472	300,651	268,060	227,546	205,464
Selected financial ratios					
Operating Ratio a	92.7%	95.3%	98.3%	99.4%	76.9%
Working Capital Ratio b	0.8X	0.8X	0.8X	0.8X	0.7X
Debt To Total Capital c	113.2%	119.8%	125.0%	133.7%	139.6%
Fixed Charge Coverage d	1.5X	1.3X	0.8X	0.4X	0.7X
Dividend Payout Ratio e					
Return on Equity (ROE) f		- Negative Shareholders' Equity -			
Return on Net Investment (ROI) g	11.8%	5.5%	5.7%	5.0%	1.6%

a Railway Operating Expenses/Railway Operating Revenues.

b Current Assets/Current Liabilities.

c Long-Term Debt/(Long-Term Debt & Shareholders' Equity).

d Income Available For Fixed Charges/Fixed and Contingent Charges.

e Cash Dividends Paid/Net Income.

f Net Income/Shareholders' Equity.

g Net Railway Operating Income/Net Investment In Rail Property As Defined In Ex Parte No. 416.

[817]

Burlington Northern, Inc.

	1981	1980	1979	1978	1977
Revenue, expense and income items			*($ in Thousands)*		
Total Railway Operating Revenues	$3,744,381	$2,982,702	$2,446,402	$1,976,408	$1,677,857
Total Railway Operating Expenses	3,444,015	2,745,644	2,340,185	1,899,194	1,396,416
Net Revenue From Railway Operations	300,366	237,058	106,217	77,214	61,544
Income Available For Fixed Charges	532,056	389,550	232,911	172,331	135,720
Fixed Charges	131,262	192,541	77,469	68,336	60,817
Income Taxes	(3,082)	20,055	(7,699)	(11,355)	
Provision For Deferred Income Taxes	136,007	44,239	(12,080)	1,800	
Extraordinary Items-Net and Accounting Changes					
Net Income	267,869	222,715	175,221	113,550	74,903
Cash Dividends Paid	91,738	42,292	34,731	29,152	24,449
Net Railway Operating Income	167,559	172,831	126,063	86,880	60,945
Condensed financial position					
Cash	6	(21,388)	27,883	3,782	20,501
Working Funds & Temporary Cash Investments	424,983	210,572	7,690	65,710	49,645
Materials and Supplies	274,809	359,218	268,062	211,829	208,185
Total Current Assets	1,208,624	1,066,233	671,181	534,755	496,738
Transportation Property-Net	3,602,328	3,455,154	2,941,813	2,751,522	2,618,394
Total Assets	5,509,907	5,092,569	4,091,867	3,726,468	3,488,655
Total Current Liabilities	944,614	788,318	578,231	463,325	399,008
Long-Term Debt Due After One Year	1,274,052	1,357,064	1,038,226	986,876	898,837
Total Shareholders' Equity	2,726,385	2,546,763	2,155,739	1,959,616	1,876,234
Total Liabilities and Shareholders' Equity	5,509,907	5,092,569	4,091,867	3,726,468	3,488,655
Selected financial ratios					
Operating Ratio a	92.0%	92.1%	95.7%	96.1%	83.2%
Working Capital Ratio b	1.3X	1.4X	1.2X	1.2X	1.2X
Debt To Total Capital c	31.8%	34.8%	32.5%	33.5%	32.4%
Fixed Charge Coverage d	4.1X	3.8X	3.0X	2.5X	2.2X
Dividend Payout Ratio e	34.2%	19.0%	19.8%	25.7%	32.6%
Return on Equity (ROE) f	10.2%	10.0%	8.5%	5.9%	4.2%
Return on Net Investment (ROI) g	4.3%	5.5%	4.1%	3.0%	2.3%

a Railway Operating Expenses/Railway Operating Revenues.

b Current Assets/Current Liabilities.

c Long-Term Debt/(Long-Term Debt & Shareholders' Equity).

d Income Available For Fixed Charges/Fixed and Contingent Charges.

e Cash Dividends Paid/Net Income.

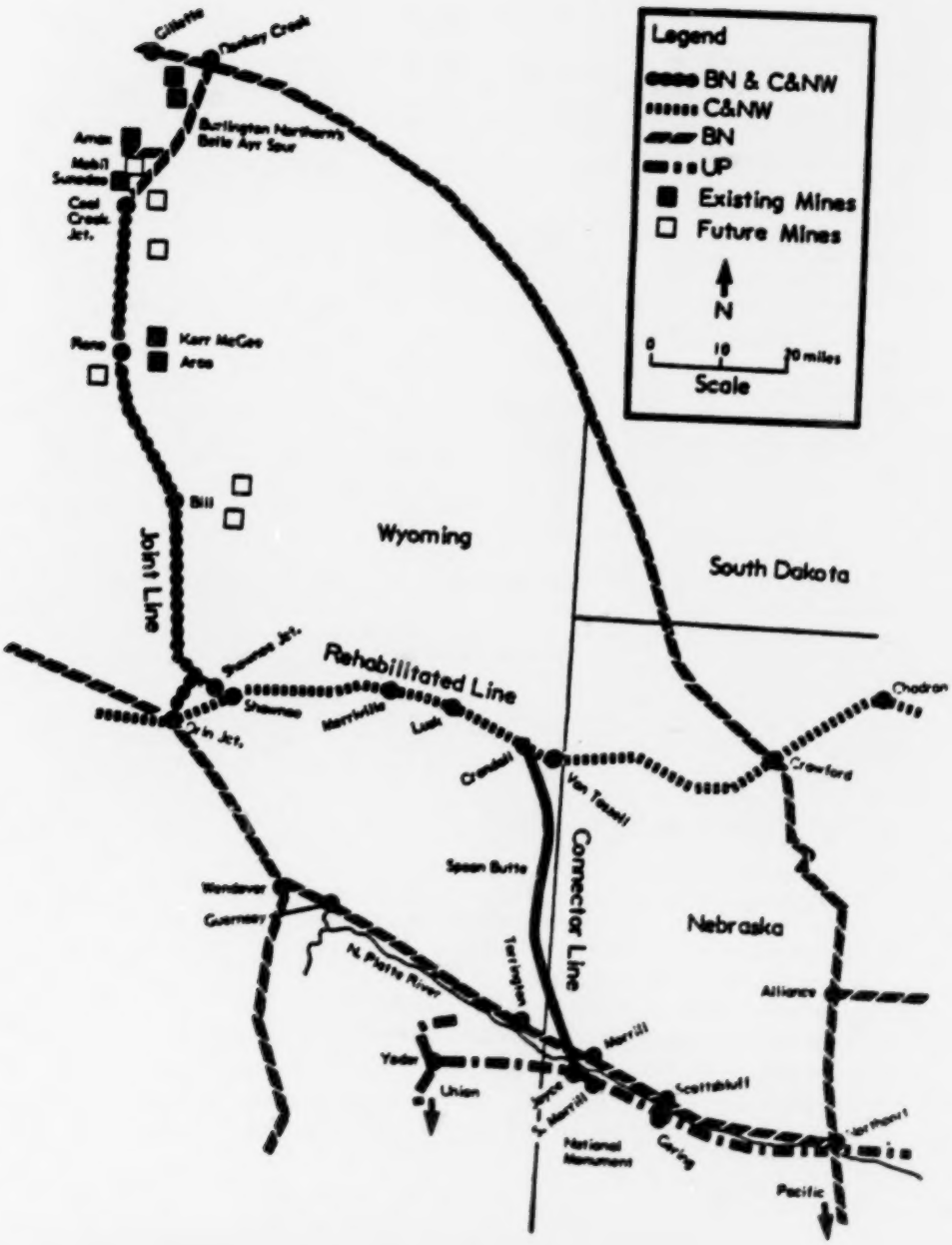
f Net Income/Shareholders' Equity.

g Net Railway Operating Income/Net Investment In Rail Property As Defined In Ex Parte No. 416.

[818]

APPENDIX K

Map of Present and Proposed Rail Lines, Coal Mines, and Other Geographical Features



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[819]

UNION PACIFIC-MISSOURI PACIFIC-
WESTERN PACIFIC RAIL SYSTEM
WASHINGTON
SEATTLE
SPOKANE
PORTLAND
MONTANA
BUTTE
NORTH DAKOTA
MINNESOTA
OREGON
IDAHO
WISCONSIN
SOUTH DAKOTA
WYOMING
NEBRASKA
IOWA
CHICAGO
OGDEN
SALT LAKE CITY
OMAHA
COUNCIL BLUFFS
SACRAMENTO
SAN FRANCISCO
NORTH PLATTE
ILLINOIS
NEVADA
UTAH
DENVER
COLORADO
KANSAS CITY
ST. LOUIS
PUEBLO
KANSAS
MISSOURI
CALIFORNIA
OKLAHOMA
AR
LOS ANGELES
ARIZONA
NEW MEXICO
LITTLE ROCK
MEMPHIS
TEXAS
FT. WORTH
DALLAS
MS
EL PASO
LA
NEW ORLEANS
SAN ANTONIO
GALVESTON
LAREDO
CORPUS CHRISTI
BROWNSVILLE
UNION PACIFIC RAILROAD
MISSOURI PACIFIC RAILROAD
WESTERN PACIFIC RAILROAD
MAJOR INTERCHANGES/MAJOR TERMINALS

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

No. 82-2253

SOUTHERN PACIFIC TRANSPORTATION COMPANY and
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
UNION PACIFIC CORPORATION, ET AL., and
CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
Intervenors

No. 82-2323

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

CHICAGO & NORTH WESTERN TRANSPORTATION CO.,
Intervenor

No. 82-2342

EDWARD K. WHEELER,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
Intervenor

No. 82-2370

KANSAS CITY SOUTHERN RAILWAY COMPANY and
LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
UNION PACIFIC RAILROAD COMPANY,
DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
SOUTHERN PACIFIC TRANSPORTATION COMPANY, and
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Intervenors

No. 82-2371

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

UNION PACIFIC RAILROAD COMPANY, ET AL.,
DENVER & WESTERN RAILROAD COMPANY, and
CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
Intervenors

No. 82-2418

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
BROTHERHOOD OF RAILWAY SIGNALMEN,
BROTHERHOOD OF RAILWAY & AIRLINE CLERKS,
INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE
WORKERS, and UNITED TRANSPORTATION UNION,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

UNION PACIFIC RAILROAD COMPANY, ET AL., and
CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
Intervenors

No. 82-2430

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Petitioner

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents

UNION PACIFIC RAILROAD COMPANY, ET AL., and
DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
Intervenors

No. 82-2479

AMERICAN TRAIN DISPATCHERS ASSOCIATION,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
Intervenor

Petitions for Review of an Order of the
Interstate Commerce Commission

Before: WRIGHT, MIKVA, and BORK, Circuit Judges.

JUDGMENT

[Filed May 22, 1984]

These causes came on to be heard on the petitions for review of an order of the Interstate Commerce Commission, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the decision of the Commission to approve this merger is affirmed, however, these cases are remanded to the Commission for reconsideration of the request by petitioner Denver & Rio Grande Western Railroad Company for independent ratemaking authority, all in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: May 22, 1984

Opinion Per Curiam.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

No. 82-2253

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

DENVER & RIO GRANDE WESTERN RAILROAD CO.,
ATCHISON, TOPEKA & SANTA FE RAILWAY CO.,
UNION PACIFIC CORPORATION, ET AL.,
CHICAGO & NORTH WESTERN TRANSPORTATION CO.,
And Consolidated Cases

BEFORE: Wright, Mikva and Bork, Circuit Judges.

ORDER

[Filed July 20, 1984]

On consideration of the Petition for Rehearing of Petitioner Edward K. Wheeler in No. 82-2342, filed June 11, 1984, it is

ORDERED by the Court that the aforesaid Petition for Rehearing is denied.

Per Curiam
For The Court:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

No. 82-2479

AMERICAN TRAIN DISPATCHERS ASSOCIATION,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY,
Intervenor

And Consolidated Cases

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

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ORDER

[Filed Jul. 20, 1984]

The Suggestion for Rehearing en banc of Petitioner American Train Dispatchers Association has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court en banc that the aforesaid Suggestion is denied.

Per Curiam
For The Court:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

No. 82-2479

AMERICAN TRAIN DISPATCHERS ASSOCIATION,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
Intervenor

And Consolidated Cases

BEFORE: Wright, Mikva and Bork, Circuit Judges.

ORDER

[Filed July 20, 1984]

On consideration of the Petition for Rehearing of Petitioner American Train Dispatchers Association filed July 6, 1984, it is

ORDERED by the Court that the aforesaid Petition for Rehearing is denied.

Per Curiam
For The Court:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

No. 82-2253

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

DENVER & RIO GRANDE WESTERN RAILROAD CO.,
ATCHISON, TOPEKA & SANTA FE RAILWAY CO.,
UNION PACIFIC CORPORATION, ET AL.,
CHICAGO & NORTH WESTERN TRANSPORTATION CO.,
Intervenors

And Consolidated Cases

BEFORE: Wright, Mikva and Bork, Circuit Judges.

ORDER

[Filed July 20, 1984]

On consideration of the Petition for Rehearing of Petitioners in No. 82-2370, filed June 25, 1984, it is

ORDERED by the Court that the aforesaid Petition for Rehearing is denied.

Per Curiam
For The Court:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

No. 82-2253

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

DENVER & RIO GRANDE WESTERN RAILROAD CO.,
ATCHISON, TOPEKA & SANTA FE RAILWAY CO.,
UNION PACIFIC CORPORATION, ET AL.,
CHICAGO & NORTH WESTERN TRANSPORTATION CO.,
Intervenors

And Consolidated Cases

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges.

ORDER

[Filed July 20, 1984]

The Suggestion for Rehearing en banc of Petitioners in No. 82-2370 has been circulated to the full Court and

no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court en banc that the aforesaid Suggestion is denied.

Per Curiam
For The Court:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge Starr did not participate in this order.

APPENDIX E

DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION, 5th AMENDMENT.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5 U.S.C. § 706 (1982)

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statuory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

49 U.S.C. § 10101a (1982)

Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government—

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

49 U.S.C. § 10701a (1982)

Standards for rates for rail carriers

(a) Except as provided in subsection (b) or (c) of this section and unless a rate is prohibited by a provision of this title, a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may establish any rate for transportation or other service provided by the carrier.

(b) (1) If the Commission determines, under section 10709 of this title, that a rail carrier has market dominance over the transportation to which a particular rate applies, the rate established by such carrier for such transportation must be reasonable.

(2) In any proceeding to determine the reasonableness of a rate described in paragraph (1) of this subsection—

(A) the shipper challenging such rate shall have the burden of proving that such rate is not reasonable if—

(i) such rate (I) is authorized under section 10707a of this title, and (II) results in a revenue-variable cost percentage for the transportation to which the rate applies that is less than the lesser of the percentages described in clauses (i) and (ii) of section 10707a(e)(2)(A) of this title; or

(ii) such rate does not meet the description set forth in clause (i) of this subparagraph, but the Commission does not begin an investigation proceeding under section 10707 of this title to determine whether such rate is reasonable; and

(B) the rail carrier challenged rate shall have the burden of proving that such rate is reasonable if—

(i) such rate (I) is greater than that authorized under section 10707a of this title, or (II)

results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than the lesser of the percentages described in clauses (i) and (ii) of section 10707a(e)(2)(A) of this title; and

(ii) the Commission begins an investigation proceeding under section 10707 of this title to determine whether such rate is reasonable.

(3) In determining whether a rate established by a rail carrier is reasonable for purposes of this section, the Commission shall recognize the policy of this title that rail carrier shall earn adequate revenues, as established by the Commission under section 10704(a)(2) of this title.

(c)(1) A rate for transportation or other service provided by a rail carrier subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title may not be established below a reasonable minimum. Any rate for transportation by such a rail carrier that does not contribute to the going concern value of such carrier is presumed to be not reasonable. A rate that contributes to the going concern value of such carrier is conclusively presumed not to be below a reasonable minimum.

(2) A rate for transportation by a rail carrier that equals or exceeds the variable cost of providing the transportation is conclusively presumed to contribute to the going concern value of such rail carrier.

(3)(A) Upon the filing of a complaint alleging that a rate is in violation of this subsection, the Commission shall take final action thereon by the 90th day after the date such complaint is filed.

(B) If the Commission determines, based on the record after opportunity for a hearing that a rate is in violation of this subsection, the Commission shall order such rate

to be raised, but only to the minimum level required by this subsection. The complainant shall have the burden of proving that such rate is in violation of this subsection.

(4) (A) For purposes of this subsection, variable costs shall be determined under formulas or procedures prescribed or certified by the Commission.

(B) In the determination of variable costs for purposes of minimum rate regulation, the Commission shall, on application of the rail carrier proposing the rate, determine only the costs of such carrier and only those costs of the specific service in question unless the specific information is not available. The Commission may not include in such variable costs an expense that does not vary directly with the level of transportation provided under the proposed rate.

49 U.S.C. § 10709 (1982)

Determination of market dominance in rail carrier rate proceedings

(a) In this section, "market dominance" means an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies.

(b) When a rate for transportation by a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title is challenged as being unreasonably high, the Commission shall determine, within 90 days after the start of a proceeding under section 10707 of this title to investigate the lawfulness of that rate, whether the carrier proposing the rate has market dominance over the transportation to which the rate applies. The Commission may make that determination on its own initiative or on complaint. A finding by the Commission that the carrier does not have market dominance is determinative in a proceeding under this subtitle related to

that rate or transportation unless changed or set aside by the Commission or set aside by a court of competent jurisdiction.

(c) When the Commission finds in any proceeding that a rail carrier proposing or defending a rate for transportation has market dominance over the transportation to which the rate applies, it may then determine that rate to be unreasonable if it exceeds a reasonable maximum for that transportation. However, a finding of market dominance does not establish a presumption that the proposed rate exceed a reasonable maximum. This subsection does not limit the power of the Commission to suspend a rate under section 10707(c) of this title. However, if the Commission has found that a carrier does not have market dominance over the transportation to which the rate applies, the Commission may suspend an increase in that rate as being in excess of a reasonable maximum for that transportation only if it specifically changes or sets aside its prior determination of market dominance.

(d) (1) In this subsection—

(A) "fixed and variable cost" means all cost incurred by rail carriers in the transportation of freight, but limiting the return on equity capital to a rate equal to the embedded cost of debt.

(B) (i) "cost recovery percentage" means the lowest revenue-variable cost percentage which, if all movements that produced revenues resulting in revenue-variable cost percentages in excess of the cost recovery percentage are deemed to have produced only revenues resulting in the cost recovery percentage, would produce revenues which would be equal, when combined with total revenues produced by all other traffic transported by rail carrier, to the total fixed and variable cost of the transportation of all traffic by rail carrier.

(ii) for purposes of determining the cost recovery percentage only, "revenue-variable cost percentage" means the quotient, expressed as percentage figure, obtained by dividing the total revenues produced by the transportation of all traffic received by rail carriers for rail transportation by the total variable cost of such transportation.

(2) In making a determination under this section, the Commission shall find that the rail carrier establishing the challenged rate does not have market dominance over the transportation to which the rate applies if such rail carrier proves that the rate charged results in a revenue-variable cost percentage for such transportation that is less than—

(A) 160 percent during the period beginning on the effective date of the Staggers Rail Act of 1980 and ending September 30, 1981;

(B) 165 percent during the period beginning October 1, 1981, and ending September 30, 1982;

(C) 170 percent during the period beginning October 1, 1982, and ending September 30, 1983;

(D) 175 percent or the cost recovery percentage, whichever is less, during the period beginning October 1, 1983, and ending September 30, 1984; and

(E) the cost recovery percentage, during each 12-month period beginning on or after October 1, 1984.

For purposes of subparagraphs (D) and (E) of this paragraph, the cost recovery percentage shall in no event be less than a revenue-variable cost percentage of 170 percent or more than a revenue-variable cost percentage of 180 percent.

(3) For purposes of determining the revenue-variable cost percentage for a particular transportation, variable costs shall be determined pursuant to section 10705a(m)(1) of this title, with adjustments specified by the Commission. A rail carrier may meet its burden of proof

under this subsection by establishing its variable costs in accordance with such section 10705a(m)(1), but a shipper may rebut that showing by evidence of such type, and in accordance with such burden of proof, as the Commission shall prescribe.

(4) A finding by the Commission that a rate charged by a rail carrier results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than the applicable percentage under paragraph (2) of this subsection does not establish a presumption that (A) such rail carrier has or does not have market dominance over such transportation, or (B) the proposed rate exceeds or does not exceed a reasonable maximum.

(5)(A) Within 180 days after the effective date of the Staggers Rail Act of 1980 and on an annual basis thereafter, the Commission shall determine the cost recovery percentage for the transportation of all traffic received by rail carriers. The Commission shall make such determination after considering each individual revenue-variable cost percentage resulting from the revenues and costs of a valid and reliable statistical sample of all movements of commodities transported by class I rail carriers during the most recent calendar year for which such information is available.

(B) If, on the basis of calculations under subparagraph (A) of this paragraph, the Commission determines that revenues earned by all class I rail carriers during the previous calendar year do not exceed the fixed and variable costs of such carriers, then the cost recovery percentage for purposes of this section shall be deemed to be equal to the cost recovery percentage last determined by the Commission.

(C) The Commission shall, in its annual report submitted to the Congress under section 10311 of this title, set forth the cost recovery percentage determined for that year under subparagraph (A) of this paragraph.

49 U.S.C. § 11343 (Supp. IV 1980)[1]

Consolidation, merger, and acquisition of control

(a) The following transactions involving carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:

(1) consolidation or merger of the properties or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.

(2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.

(3) acquistion of control of a carrier by any number of carriers.

(4) acquistion of control of at least 2 carriers by a person that is not a carrier.

(5) acquistion of control of a carrier by a person that is not a carrier but that controls any number of carriers.

(6) acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

(b) A person may carry out a transaction referred to in subsection (a) of this section or participate in achieving the control or management, including the power to

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[1] Section 11343 is reprinted above as it appeared prior to its amendment on September 20, 1982 by Pub. L. 97-261, § 21(b), 96 Stat. 1122. Pub. L. 97-261, § 21(b) became effective sixty days after its enactment, Pub. L. 97-261, § 31, *after* the date of the decision by the Commission in this case.

exercise control or management, in a common interest of more than one of those carriers, regardless of how that result is reached, only with the approval and authorization of the Commission under this subchapter. In addition to other transactions, each of the following transactions are considered achievements of control or management:

(1) A transaction by a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(2) A transaction by a person affiliated with a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(3) A transaction by at least 2 persons acting together (one of whom is a carrier or is affiliated with a carrier) has the effect of putting those persons and carriers and persons affiliated with any of them, or with any of those affiliated carriers, taken together, in control of another carrier.

(c) A person is affiliated with a carrier under this subchapter if, because of the relationship between that person and a carrier, it is reasonable to believe that the affairs of another carrier, control of which may be acquired by that person, will be managed in the interest of the other carrier.

(d) (1) Approval and authorization by the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are motor carriers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and the aggregate gross operating revenues of those carriers were not more than $2,000,000 during a period of 12 consecutive months ending not more than 6 months before the date of the agreement of the

parties covering the transaction. However, the approval and authorization of the Commission is required when a motor carrier that is controlled by or affiliated with a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is a party to the transaction.

(2) The approval and authorization of the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are street, suburban, or interurban electric railways that are not controlled by or under common control with a carrier that is operated as part of a general railroad system of transportation.

Pub.L. 95-478, Oct 17, 1978, 92 Stat. 1984; Pub.L. 96-296, § 18(b), July 1, 1980, 94 Stat. 811.

49 U.S.C. § 11344 (Supp. IV 1980)[2]

Consolidation, merger, and acquisition of control: general procedure and conditions of approval

(a) The Interstate Commerce Commission may begin a proceeding to approve and authorize a transaction referred to in section 11343 of this title on application of the person seeking that authority. When an application is filed with the Commission, the Commission shall notify the chief executive officer of each State in which property of the carriers involved in the proposed transaction is located and shall notify those carriers. If a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title is involved in the transaction, the Commission must notify the persons specified in section 10328(b) of this title. The Commission shall hold a public hearing when a rail

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[2] Section 11344 is reprinted above as it appeared prior to its amendment on September 20, 1982 by Pub. L. 97-261, §§ 21(f), (g), 96 Stat. 1123. Pub. L. 97-261, §§ 21(f), (g), became effective sixty days after its enactment, Pub. L. 97-261, § 31, *after* the decision by the Commission in this case.

carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is involved in the transaction unless the Commission determines that a public hearing is not necessary in the public interest.

(b) In a proceeding under this section which involves the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:

(1) the effect of the proposed transaction on the adequacy of transportation to the public.

(2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(3) the total fixed charges that result from the proposed transaction.

(4) the interest of carrier employees affected by the proposed transaction.

(5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commission may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the

transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest.

(d) In a proceeding under this section which does not involve the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall approve such an application unless it finds that—

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In making such findings, the Commission shall, with respect to any application that is part of a plan or proposal developed under section 5(a)-(d) of the Department of Transportation Act (49 U.S.C. 1654(a)-(d)), accord substantial weight to any recommendations of the Secretary of Transportation.

(e) A rail carrier, or a person controlled by or affiliated with a rail carrier, together with one or more affected shippers, may apply for approval under this subsection of a transaction for the purpose of providing motor carrier transportation prior or subsequent to rail transportation to serve inadequately served shippers located on a railroad other than the applicant carrier.

Such application shall be approved by the Commission if the applicants demonstrate presently impaired rail service and inadequate motor common carrier service which results in the serious failure of the rail carrier serving the shippers to meet the rail equipment or transportation schedules of shippers or seriously to fail otherwise to provide adequate normal rail services required by shippers and which shippers would reasonably expect the rail carrier to provide. The Commission shall approve or disapprove applications under this subsection within 30 days after receipt of such application. The Commission shall approve applications which are not protested by interested parties within 30 days following receipt of such application.

49 C.F.R. § 1180.1 (1983)[3]

General policy statement for merger or control of at least two Class I railroads.

(a) *General.* The Interstate Commerce Commission encourages private industry initiative that leads to the rationalization of the nation's rail facilities and reduction of its excess capacity. One means of accomplishing these ends is rail consolidation. However, the Commission does not favor consolidations through the exercise of managerial and financial control if the controlling entity does not assume full responsibility for carrying out the controlled carrier's common carrier obligation to provide adequate service upon reasonable demand. Furthermore, the Commission does not favor consolidations that substantially reduce the transport alternatives available to shippers unless there are substantial and demonstrable benefits to the transaction that cannot be achieved in a less anticompetitive fashion. Our analysis of the competitive impacts of a consolidation is especially critical in light of the Congressionally mandated commitment

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[3] This section was originally numbered 49 C.F.R. § 1111.1. The redesignation occurred on November 1, 1982. 47 Fed. Reg. 49592.

to give railroads greater freedom to price without regulatory interference.

(b) *Consolidation criteria.* The Commission's consideration of the merger or control of at least two class I railroads is governed by the criteria prescribed in 49 U.S.C. 11344 and by the rail transportation policy set forth in 49 U.S.C. 10101a.

(1) Section 11344 directs the Commission to approve consolidations which are consistent with the public interest. In examining a proposed transaction, the Commission must consider, at a minimum: (i) The effect on the adequacy of transportation to the public; (ii) the effect of including, or failing to include, other rail carriers in the area involved in the proposed transaction; (iii) the total fixed charges that would result; (iv) the interest of affected carrier employees; and (v) the effect on competition among rail carriers in the affected region.

(2) The Commission must also consider the impact of any transaction on the quality of the human environment and the conservation of energy resources.

(c) *Public interest considerations.* In determining whether a transaction is in the public interest, the Commission performs a balancing test. It weights the potential benefits to applicants and the public against the potential harm to the public. The Commission will consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation that would result in less potential harm to the public.

(1) *Potential benefits.* Both the consolidated carrier and the public can benefit from a consolidation if the result is a financially sound competitor better able to provide adequate service on demand. This beneficial result can occur if the consolidated carrier is able to realize operating efficiencies and increased marketing opportunities. Since consolidations can lead to a reduction in redundant facilities and thereby to an increase in traffic

density on underused lines, operating efficiencies may be realized. Furthermore, consolidations are the only feasible way for rail carriers to enter many new markets other than by contractual arrangement, such as for joint use of rail facilities or run-through trains. In some markets where there is sufficient existing rail capacity the construction of new rail line is prohibitively expensive and does not represent a feasible means of entry into the market.

(2) *Potential harm.* There are two potential results from consolidations which would ill serve the public—reduction of competition and harm to essential services. In analyzing these impacts, we must consider, but are not limited by, the policies embodied in antitrust laws.

(i) *Reduction of competition.* If two carriers serving the same market consolidate, the result would be the elimination of the competition between the two. Even if the consolidating carriers do not serve the same market, there may be a lessening of potential competition in other markets. While the reduction in the number of competitors serving a market is not in itself harmful, a lessening of competition resulting from the elimination of a competitor may be contrary to the public interest. The Commission recognizes that rail carriers face not only intramodal competition, but also intermodal competition from motor and water carriers. The Commission's competitive analysis depends on the relevant market(s). In some markets the Commission's focus will be on the preservation of effective intermodal competition, while in other markets (such as long-haul movements of bulk commodities) effective intramodal competition may also be important.

(ii) *Harm to essential service.* Consolidations often result in shifts in market patterns. Sometimes the carrier losing its share of the market may not be able to withstand the loss of traffic. In assessing the probable

impacts, the Commission's concern is the preservation of essential services, not the survival of particular carriers. A service is essential if there is a sufficient public need for the service and adequate alternative transportation is not available.

(d) *Conditions.* (1) The Commission has broad authority to impose conditions on consolidations, including those that might be useful in ameliorating potential anticompetitive effects of a consolidation. However, the Commission recognizes that conditions may lessen the benefits of a consolidation to both the carrier and the public. Therefore, the Commission will not normally impose conditions on a consolidation to protect a carrier unless essential services are affected and the condition: (i) Is shown to be related to the impact of the consolidation; (ii) is designed to enable shippers to receive adequate service; (iii) would not pose unreasonable operating or other problems for the consolidated carrier; and (iv) would not frustrate the ability of the consolidated carrier to obtain the anticipated public benefits. Moreover, the Commission believes that indemnification is ordinarily not an appropriate remedy in consolidation proceedings. Indemnification conditions can be anticompetitive by requiring the consolidated carrier to subsidize carriers who are no longer able to compete efficiently in the marketplace.

(2) As of July 1, 1982, Conditions previously imposed are revoked unless the parties to specific consolidation proceedings demonstrate a public interest in continuing the Conditions in those proceedings.

(e) *Inclusion of other carriers.* The Commission will consider requiring inclusion of another carrier as a condition to approval only where there is no other reasonable alternative for providing essential services, the facilities fit operationally into the new system, and inclusion can be accomplished without endangering the operational or financial success of the new company.

(f) *Labor protection.* The Commission is required to provide applicants' employees affected by a consolidation with adequate protection. Similarly situated employees on the applicants' system should be given equal protection. Therefore, absent a negotiated agreement, the Commission will provide for protection at the level mandated by law (49 U.S.C. 11347), unless it can be shown that because of unusual circumstances more stringent protection is necessary to provide employees with a fair and equitable arrangement. The Commission will review negotiated agreements to assure fair and equitable treatment of affected employees.

(g) *Cumulative impacts and crossover effects.* The Commission recognizes that events can occur during its consideration of a consolidation that can have an effect on various of the concerned parties. However, the Commission is mindful of the need to meet its statutory deadlines and make timely administratively final decisions. Therefore, the Commission will not reopen pending proceedings in order to assess the impact of potential or hypothetical combinations or transactions. The proper forum for considering cumulative impacts and crossover effects is in a later proceeding. In this manner, consideration will be limited to the impacts of transactions which have already been approved and are, therefore, reasonably certain to occur. Furthermore, the Commission will have the benefit of its findings from the prior proceeding to identify more precisely the impacts of that transaction. Proceedings will remain manageable in scope and size, statutory time limits will be met, and all parties will be assured of timely, administratively final decisions.

(h) *Public participation.* To assure a fully developed record on the impacts of a proposed railroad consolidation, the Commission encourages public participation from Federal, State, and local government departments and agencies, affected shippers and carriers, and other interested persons.

APPENDIX F

DOT-9

Before the
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 30000

UNION PACIFIC CORPORATION, PACIFIC RAIL SYSTEM, INC.,
and UNION PACIFIC RAILROAD COMPANY
—CONTROL—
MISSOURI PACIFIC CORPORATION and
MISSOURI PACIFIC RAILROAD COMPANY

Finance Docket No. 30000 (Sub-No. 1, et al.)

UNION PACIFIC CORPORATION, PACIFIC RAIL SYSTEM. INC.,
and UNION PACIFIC RAILROAD COMPANY
—CONTROL—
WESTERN PACIFIC RAILROAD COMPANY

BRIEF OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION

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March 8, 1982

[3] II. *SUMMARY OF ARGUMENT*

The United States Department of Transportation supports approval of the proposed consolidations of the Union Pacific/Missouri Pacific/Western Pacific Railroads (UP/MP/WP). These consolidations will result in benefits to the applicants and the shipping public in the form of decreased transit times, increased supply of equipment, expanded single-system service, greater reliability resulting from centralized control of the operations of the consolidated system, and improved marketing capabilities. Applicants will also benefit by reductions in administrative and operational costs. These private and public benefits should improve the financial and competitive condition of the applicants and improve the level of service to the shipping public. Generally, DOT supports industry-initiated proposals in railroading. However, we perceive a responsibility to examine the transaction from a broad public interest perspective and ascertain the effects and consequencs of the proposal. In this proceeding, approval of the consolidations, while providing benefits, will also result in reductions in competition in certain markets (broad geographical regions) or corridors (parallel routes between major origins and destinations). In DOT's view, the benefits of the consolidations can be realized without incurring reductions in competition, if approval of the transactions is conditioned by the Commission to eliminate or limit these reductions in competition.

Specifically, the Department has identified the following areas where procompetitive conditions should be imposed to restore the level of competition that will be reduced as a direct result of the consolidations:

[4] 1. Between Kansas City, MO-St. Louis, MO,

2. Between Kansas City, MO/KS-Pueblo, CO,

3. Between Kansas City, MO/KS-Omaha, NE,

4. Between San Antonio, TX-Corpus Christi, TX,
5. Between San Antonio, TX-Laredo, TX,
6. From Kansas City to five electric utilities located at Fort Gibson, OK; White Bluffs, AK; Newark, AK; Oclogah, OK; and Nearman, KS.

In DOT's opinion, the level of intramodal competition will be reduced in the areas listed above because parallel routes will come under common control by applicants or because a nonincluded carrier will lose its last neutral or friendly connection to markets reached prior to the consolidations in joint-line service with one or more of the applicants. In either of these cases, the consolidations will reduce the number of competitive routes available to the shipping public, thereby reducing the level of competition. Pro-competitive conditions should be imposed by the Commission to assure that the ability of nonincluded carriers to compete and the level of competition is not adversely affected. The preferred method of alleviating the reductions in competition that occur as a direct result of consolidations is a grant of trackage rights over the lines described above.

A determination of the appropriate level of compensation for the various trackage rights is also an important consideration, because the level of compensation is a cost element that can significantly affect the tenant carrier's ability to compete and the owning carrier's ability to earn adequate revenues. The appropriate compensation for the trackage rights should initially be left to the parties to resolve. However, if private negotiations are not successful within a reasonable time, perhaps 60 days from the issuance of the Commission's decision, the Commission should set the amount of compensation at a level which will not defeat the purpose of the trackage rights, *i.e.*, enabling the tenant to compete. A proposed formula for [5] determining the proper method of compensation is discussed in section III.E., below.

In addition, several carriers have sought the imposition of conditions other than trackage rights to ameliorate reductions in compensation where trackage rights are not feasible. These include the imposition of various rate and operating conditions. As with requested trackage-rights, the standard should be whether the imposition of specifically tailored procompetitive conditions at certain gateways are necessary to alleviate reductions in competition resulting from the consolidations. Our views are discussed, below, in sections of the brief treating individual carriers.

As regards the C&NW pooling application, it is our position that this application should also be judged by whether it reduces intramodal competition. Based on our review, we have concluded that it does not result in a reduction in the level of competition.

DOT urges the Commission to approve these consolidations, if conditions are imposed to assure that the levels of intramodal competition are maintained. Competition is necessary to ensure not only that the proposed benefits of consolidation are passed on to the shipping public, but to ensure that the benefits of competition—lower rates and better service—are available to meet present and future transportation needs.

APPENDIX G

OFFICE OF CHAIRMAN TAYLOR

Finance Docket No. 30,000 *et al.*

UNION PACIFIC RAILROAD COMPANY—CONTROL—MISSOURI PACIFIC CORPORATION AND MISSOURI PACIFIC RAILROAD COMPANY ET AL.

September 14, 1982

MEMORANDUM TO SECRETARY MERGENOVICH:

On Monday, September 13, 1982, at a closed conference, a majority of the Commission voted to grant the primary and related applications Sub-Nos. 1 through 7, and motor carrier applications MC-F-14448 and MC-F-14449. The pooling applications in Sub-Nos. 8, 9, and 10 were dismissed for lack of jurisdiction. Commissioner Andre voted to deny the applications but if a majorty approved them he wished to be shown as noted below.

The entire Commission voted to approve the trackage rights requested in applications Sub-Nos. 16, 17, 18, and 25-32, and agreed that the issue of trackage rights compensation should be decided by the parties but failing that the Commission will arbitrate and will provide guidelines to be used in settling a dispute. A majority of the Commissioners voted to deny the applications in Sub-Nos. 14, 15, 20, 21, 22, 33, 34, 36, 37, 39, 40, and 41. Commissioner Andre voted to approve these applications. Commissioner Simmons voted to grant Sub-No. 39.

The Commission failed to reach a majority on Sub-Nos. 23 and 24 with Chairman Taylor, and Commissioners Andre and Simmons voting to grant, and Vice

Chairman Gilliam, and Commissioners Sterrett and Gradison voting to deny. Therefore the applications are denied.

A majority of the Commission voted to approve Subsections 4(b) and 5 (Sub-No. 43) of the C&NW settlement and to take no action on the other conditions in that settlement or in the Conrail settlement. Commissioner Gradison voted to approve Subsection 4(a) of the C&NW settlement. Commissioner Andre abstained. Therefore, antitrust immunity is granted only for Subsections 4(b) and 5 of the C&NW settlement.

The Commission failed to reach a majority on the request of the BN for independent ratemaking authority. Chairman Taylor and Commissioners Andre and Simmons voted to impose a limited ratemaking condition for coal for the BN over the MP to five coal burning utilities but not on future plants built on the line. The condition would have been triggered by the entry of the C&NW into the Powder River Basin. Vice Chairman Gilliam, and Commissioners Sterrett and Gradison voted to deny any condition. Therefore no condition is imposed.

A majority of the Commission voted to remove the Bieber Route conditions imposed on the BN in the Northern Lines Merger. Chairman Taylor and Commissioner Simmons were opposed on the ground that this proceeding is not an appropriate forum. Commissioner Andre abstained.

The entire Commission voted to impose the standard labor protective conditions on the primary and related applications, the related trackage rights applications, and on the imposed trackage and pooling agreements.

The entire Commission voted to find no adverse environmental impacts but to impose two conditions: (1) flood flow requirements for new siding to be constructed near Denmon, NE, and (2) require the taking of historic

preservation measures in retiring properties in Topeka and Omaha.

The entire Commission voted to deny the relief requested by a group of Missouri Pacific shareholders, the rate condition sought by the Water Transportation Association, and the passenger service condition requested by the State of California. A majority of the Commission voted to deny all other requested conditions. Commissioner Andre voted to grant all other requested conditions.

Sub-Nos. 19, 35, 38, and 42 were dismissed.

All Commissioners reserve their rights to submit separate expressions.

A written decision will be issued on or before October 20, 1982.

GAIL GIBBONS

cc: All Commissioners
Director Hardy
Director Hatton
Director Dahlgren
Deputy Director Gitomer

OFFICE OF CHAIRMAN TAYLOR

Finance Docket No. 30,000 *et al.*

UNION PACIFIC RAILROAD COMPANY—CONTROL—MISSOURI PACIFIC CORPORATION AND MISSOURI PACIFIC RAILROAD COMPANY ET AL.

September 22, 1982

MEMORANDUM TO THE COMMISSION:

I vote to approve the draft decision subject to the following modifications.

(1) Sub-Nos. 23 and 24 which provide for MKT trackage rights over MP's line between San Antonio and Corpus Christi, TX and use of terminal facilities at Corpus Christ should be granted.

(2) A limited ratemaking condition for coal should be imposed for the BN over the MP to the five requested coal burning utilities but not on future plants built on the lines. The condition should be triggered by the entry of the C&NW into the Powder River Basin.

I have no objection to the removal of the Beiber Route condition but believe that this proceeding is neither the right time nor place in which to do it.

/s/ Reese H. Taylor, Jr.
REESE H. TAYLOR, JR.

cc: Clearance Unit
Director Hardy
Deputy Director Gitomer

OFFICE OF COMMISSIONER SIMMONS

September 24, 1982

Finance Docket No. 30,000

UNION PACIFIC CORPORATION AND UNION PACIFIC RAILROAD COMPANY—CONTROL—MISSOURI PACIFIC CORPORATION AND MISSOURI PACIFIC RAILROAD COMPANY ET AL.

MEMORANDUM TO CHAIRMAN TAYLOR:

I vote to approve the draft decision subject to the following modifications:

(1) Sub-Nos. 23 and 24 which provide for MKT trackage rights over MP's line between San Antonio and Corpus Christi, TX and use of terminal facilities at Corpus Christi should be granted.

(2) Sub-No. 39 which provide for BN-trackage rights over MP's line between Claremore and Fort Gibson, OK should be granted.

(3) A limited ratemaking condition should be imposed giving BN the concurrence of MP on joint rates on coal routed via Kansas City to power plants at Oologah, OK, Falls City, NE, Fort Gibson, OK, White Bluff, AR, and Newark, AR, provided those rates give MP its revenue on equivalent rates and routes.

I have no objection to the removal of the Bieber route condition, although I believe this result could better be accomplished through reopening of the *Northern Line* case.

I vote to modify the text of the decision as follows:

(1) On page 204, line 12, add the following citation after "significant public interest issues.":

"F.D. No. 28499 (Sub-No. 1), *Norfolk & Western Railway Co. and Baltimore & Ohio Railroad Co.—Control—Detroit, Toledo & Ironton Railroad Co. (CTW-DTI Control)* (not printed), served May 13, 1982, at 7-8."

(2) On page 205, line 10, add the following citation after "implemented.":

"*GTW-DTI Control* at 7-8."

(3) On page 210, line 3, delete "significantly".

(4) On page 210, revise the footnote to read as follows:

"—/Indeed, it appears unlikely that the agreement could require UP to preserve competitive rates over Chicago in circumstances where the St. Louis route is more efficient than the Chicago route. Under the agreement, UP's net contribution via St. Louis includes both its own contribution for service west of Kansas City *and* the net contribution obtained by MP for service between that Missouri River gateway and the Mississippi River gateway at St. Louis. UP's contribution via Chicago, in contrast, includes only its own contribution for service west of the Missouri River gateways of Fremont/Omaha/Council Bluffs. As a result, UP's net contribution via Chicago can drop below 90 percent of its net contribution via St. Louis even in circumstances where the Chicago route is more efficient than the St. Louis route."

(5) On page 211, line 6, change "close" to "discourage use of".

(6) On page 213, the first full paragraph should be revised to read as follows:

"On the other hand, the agreement may, in rare circumstances, protect inefficient routings." This potential harm, however, is not substantial because of the 90 percent net contribution requirement, as previously noted in our discussion of the second factor of *Traffic Protective Conditions, supra.*"

(7) Delete the last paragraph on page 213, including the first two carryover lines at the top of page 214.

As suggested in the circulation memorandum, additional proofreading and non-substantive editorial changes have been submitted directly to the staff.

I, again, commend the merger team members in the Offices of Hearings, Proceedings, Transportation Analysis, and Compliance and Consumer Assistance and in the Bureau of Accounts for their efforts in preparing a careful, thorough, well organized and well written decision in this complex case.

/s/ J. J. Simmons, III
J. J. SIMMONS, III

cc: All Commissioners
Director Hardy
Deputy Director Gitomer
Clearance Unit

OFFICE OF COMMISSIONER ANDRE

September 15, 1982

Finance Docket No. 30,000

UNION PACIFIC CORPORATION, PACIFIC RAIL SYSTEM, INC., and UNION PACIFIC RAILROAD COMPANY—CONTROL—MISSOURI PACIFIC CORPORATION and MISSOURI PACIFIC RAILROAD COMPANY ET AL.

MEMORANDUM TO CHAIRMAN TAYLOR:

In anticipation of circulation of the decision effecting our vote of Monday, September 13, 1982, I vote to deny the merger application. I also reserve my right to submit a separate expression.

/s/ Frederic N. Andre
FREDERIC N. ANDRE

cc: Commissioners

OFFICE OF COMMISSIONER GRADISON

Finance Docket No. 30,000 *et al.*

UNION PACIFIC RAILROAD COMPANY—CONTROL—
MISSOURI PACIFIC CORPORATION and
MISSOURI PACIFIC RAILROAD COMPANY ET AL.

September 24, 1982

MEMORANDUM TO CHAIRMAN TAYLOR:

I vote to approve the draft decision.

/s/ Heather J. Gradison
HEATHER J. GRADISON

cc: All Commissioners
Director Hardy
Clearance Unit
Deputy Director Gitomer

OFFICE OF VICE CHAIRMAN GILLIAM

Finance Docket No. 30,000

UNION PACIFIC CORPORATION and UNION PACIFIC RAILROAD COMPANY—CONTROL—MISSOURI PACIFIC CORPORATION and MISSOURI PACIFIC RAILROAD COMPANY

September 24, 1982

MEMORANDUM TO CHAIRMAN TAYLOR:

I vote to approve the draft decision.

Please show me with the following separate expression. My separate expression should be attached and appended to any clearance, notice of decision, the decision itself and any Commission press release. I further reserve the right to review any of the above prior to their being made public.

/s/ R.E.G.
GILLIAM

cc: All Commissioners
Clearance Unit

VICE CHAIRMAN GILLIAM, concurring:

As the senior member of this Commission, I have participated in every major rail related proceeding since enactment of the Staggers Rail Act in 1980. I have carefully assessed and evaluated the rail modernization trend that began with the Staggers Act and was followed by the CSX decision, the Rail Merger Policy Statement, the Traffic Protective Conditions Rulemaking, the Norfolk Southern Case, both Guilford acquisitions as well as countless other smaller proceedings.

I have concluded that the UP/MOPAC decision is the culmination of the first phase of a fundamental reordering and modernization of the railroad industry. The modernization trend exemplified by this decision has *three* specific ramifications that I wish to articulate at this time:

1. We are clearly and irreversably embarked upon a new era of total transportation companies which will soon have capacities to provide regional and transcontinental freight hauls under single system networks. These new consolidated systems promise to be forerunners of integrated transportation networks which will embrace all modes (rail, motor, air, water). These new systems will spawn a new generation of intermodal technologies and equipment development as well as innovative market, pricing and service strategies. Strengthened, modernized systems and single system national transportation companies will radically alter traditional competitive relationships between rail and motor modes.

2. Large scale combinations of the type we've approve today will stimulate intense rail competition which will inevitably lead to further consolidation attempts by other carriers in order to competitively respond to these new sytems. Specifically, I would not be surprised to see Santa Fe, SP, DRGW and others move rapidly toward other transportation combinations and acquisitions as a matter of competitive strategy. Similarly, I would not be surprised to see the new large eastern systems soon move to establish relationships with the western systems. Nor would it be surprising to see formerly conservative railroad management become actively involved in acquisitions of motor carrier companies and airlines. Such is the nature of healthy, dynamic business competition. In short, U.S. freight transportation is posed to undergo dramatic change and this decision is symbolic of that change.

Under no circumstances should today's merger be viewed as a product of today's weak economy. Indeed the long-term competitive benefits of this decision will become *most* apparent in a revived economy.

3. This decision is a benchmark in terms of the federal relationship to the railroad industry. As evidenced by this case, railroad management and initiative is appropriately assuming primary responsibility for the structure, operations and pricing mechanisms of the new system. The Commission's role as demonstrated by its limited use of its conditioning power in this case is to guard against abuse of market power and potential monopolistic activity. If future Commissions are lax in this necessary but limited role, there will be inevitable calls for the resurgence of regulation. Such a development would quickly nullify many of the modern public benefits and freedoms promised by this and other mergers.

In this decision, I am pleased to say we have appropriately exercised this role by imposing limited but carefully designed conditions that foster essential regional and transcontinental competition.

Throughout this proceeding, I have been particularly concerned that the SP, DRGW and Sante Fe remain strong viable carriers. Today's decision ensures competitive opportunities for these roads. I have personally inspected portions of all three of their systems and met many of their top management. I feel confident that SP and DRGW will utilize the conditions granted in this decision in ways that maintain and improve their competitive positions. I am equally confident that the Sante Fe will continue to utilize its physically advantageous right of way and press forward with its outstanding new intermodal technologies and exceptionally speedy, efficient transit times from the midwest to the West Coast and back. If it does, it will provide extremely strong competition for the new system to the great benefit of the public.

In sum, this merger is an affirmation of the national consensus for reduced railroad regulation and increased private sector initiative. The clear message of this decision is that the transportation industry is undergoing a fundamental change and that the era of total coordinated transportation networks has arrived.

I should add, however, that I have serious reservations concerning the Commission's adjudication of the fairness of UP's offer to the holders of the 13 percent untendered WPRR common stock. I believe such controversies regarding stock valuation are best left to negotiations between the affected shareholders and corporate entities and, where the parties cannot agree, to adjudication in the courts. The private sector, not the Commission, is the appropriate forum for resolving these issues. Moreover, I believe once the Commission has approved control, it should not intervene in future capital or corporate structure changes that have no bearing on significant transportation matters.

Unfortunately, an option which was not seriously considered in this case was (1) approval of only the control of WPRR by UP through its current 87 percent stock ownership; and (2) exemption from regulation under 49 U.S.C. 10505 of the WPRR merger into a UPRR subsidiary. This way, UP and WPRR could still consummate the proposed merger, but dissenting shareholders would be free to contest the stock valuation in an appropriate judicial forum.

In sum, in future consolidation proceedings I would strongly encourage the Commission to approve only those elements of the proposed transaction which are necessary to effect the consolidation. All other corporate and stock related elements of the transaction, to the extent they can be handled separately and they do not raise significant transportation matters, should be exempt from regulation. In this manner, responsibility for nontransportation matters will appropriately be left with the affected parties and the courts.

OFFICE OF COMMISSIONER STERRETT

Finance Docket No. 30000

UNION PACIFIC CORPORATION, PACIFIC RAIL SYSTEM, INC., AND UNION PACIFIC RAILROAD COMPANY—CONTROL—MISSOURI PACIFIC CORPORATION AND MISSOURI PACIFIC RAILROAD COMPANY

September 24, 1982

MEMORANDUM TO CHAIRMAN TAYLOR:

I vote to approve the draft decision with the changes contained in the attachment.

I also commend the staff who worked on this difficult case. I am particularly pleased with the timeliness of this decision, and with the quality of draftsmanship. The staff can rightfully be proud of a job very well done.

/s/ Malcolm M. B. Sterrett
MALCOLM M. B. STERRETT

Attachment

cc: All Commissioners
Director Hardy
Deputy Director Gitomer
Clearance Unit

ATTACHMENT

(1) Change "midwest" to "midwestern" on line 6 of page 13.

(2) Delete "presently" on line 8 of page 13, on line 11 of page 17, on line 1 of page 42, on lines 11 and 18 of page 66, on the last line of page 80, on line 11 of page 81, on lines 11 and 19 of page 85, on line 3 of page 86, on line 25 of page 92, on line 22 of page 156, and on line 10 of page 248.

(3) Capitalize "northwest" and "southwest" on the last line on page 19.

(4) Change "effected" to "affected" on the last line of page 20.

(5) Change "effect" to "affect" on line 6 of page 21.

(6) Change the comma to a period and capitalize "we" on line 4 of page 22.

(7) Capitalize "northwest" on line 12 of page 32.

(8) Capitalize "midwest" on lines 13 and 14 of page 32.

(9) Change "utilization" to "use" on line 27 of page 32.

(10) Capitalize "midwest," "south," and "west coast" on lines 10, 11, and 18 of page 33.

(11) Change "presently" to "now" on line 11 of page 41, line 4 of page 93, line 16 of page 253.

(12) Change "utilize" to "use" on line 11 of page 43.

(13) Insert "now" before "moving" on line 3 of page 44; strike "presently" on the next line.

(14) Change "utilization" to "use" on line 10 of page 48.

(15) Delete "actually" on the first line of the double-spaced text on page 69.

(16) Capitalize "west" and "east" on lines 2, 3, 6, 11, 14, 18, and 24 of page 71.

(17) Change "currently BN is" to "BN is now" on line 20 of page 88.

(18) Change "through out the west" to "throughout the West" on the last line of page 93.

(19) Separate "that" and "competing" on line 5 of page 104.

(20) Insert "We are unpersuaded by" before "BN's" on line 22 of page 105; strike "are not persuasive" two lines later.

(21) Change "This" to "These" on line 2 of page 148.

(22) Strike "operations" on line 3 of page 150; strike "would be" on the next line.

(23) Capitalize 'midwest" on line 6 of page 152.

(24) Capitlize [sic] "west" and "midwest" on line 21 of page 164.

(25) Change "Rock Island line it presently owns" to "recently obtained Rock Island line" on lines 18 and 19 of page 166.

(26) Insert a comma after "UP" on line 4 of page 171; strike "only serve to" on the same line.

(27) Strike the footnote on page 176.

(28) Strike the second sentence in the second full paragraph on page 179; replace with: "Granting SP access to both segments will not materially impair the operations of the involved carriers."

(29) Change "would" to "may" on line 14 of page 182.

(30) Insert "will" at the beginning of line 4 on page 187.

(31) Correct the spelling of "require" on line 8 of page 187.

(32) Strike "completely" on the third line from the bottom of page 192.

(33) Change the first line of the second footnote on page 201 to read "In these circumstances, we will not determine whether"; change "might" to "are likely to" on line 4 of the same footnote.

(34) Change "will take no actions" to "actions will not be" on line 20 of page 203.

(35) Strike ", however," on line 12 of page 206.

(36) Change "be pro-competitive rather than" to "not be" on line 21 of page 207.

(37) Insert "or unprofitable" after "noncompensatory" on line 19 of page 209.

(38) Strike "significantly" on line 3 of page 210; change "would most likely" to "could compete and" on line 13 and 14 of page 210; change "invoke" to "invoking" on line 15; and insert "probably" before "would" on line 16.

(39) Change "promotes' to "appears to promote" on line 3 of page 211.

(40) Insert "unduly" before "protect" on line 1 of page 212.

(41) Change "therefore will" to "therefore, appears to" on line 2 of page 213.

(42) Correct the spelling of "potential" on line 18 of page 213.

(43) Strike "utterly" on line 6 of page 222.

(44) Change "have" to "has" on the second to last line of the text on page 228, and change "their" to "its" on the next line.

(45) Change "have" to "has" on the third line of page 230.

(46) Insert a comma after "prospects" on page 244.

(47) Correct the spelling of "brought" on line 2 of page 247.

(48) Correct the spelling of "including" on line 1 of page 251 and on line 2 of page 253.

(49) Insert a comma after "provision" on line 3 of page 252.

(50) Strike "herein" on the second to last line on page 264, on line 14 of page 266, and on line 6 of page 267.

OFFICE OF COMMISSIONER SIMMONS

October 1, 1982

Finance Docket No. 30,000

UNION PACIFIC RAILROAD COMPANY—CONTROL—MISSOURI PACIFIC CORPORATION AND MISSOURI PACIFIC RAILROAD COMPANY, ET AL.

MEMORANDUM TO CHAIRMAN TAYLOR:

Please show me with the following attached separate expression.

/s/ J. J. Simmons, III
J. J. SIMMONS, III

cc. All Commissioners
Director Hardy
Deputy Director Gitomer
Clearance Unit

COMMISSIONER SIMMONS, concurring:

I join in the Commission's decision to approve, with conditions, the consolidation of the Union Pacific, Missouri Pacific, and Western Pacific rail systems. The record amply demonstrates that the consolidation will bring significant cost savings and service improvements to the merged system and the shippers it serves. It also demonstrates that to the extent the consolidation threatens competition or the provision of essential services, it does so in individual corridors and markets, thus permitting us to craft corrective conditions. Our grant of trackage rights conditions to DRGW and SF/SSW in the central corridor, and to MKT north of Kansas City, go a long

way toward eliminating the possible adverse effects I see from this consolidation.

I would, however, have imposed two additional conditions to ameliorate potential anti-competitive effects of the consolidation.

First, I would have imposed the trackage rights requested by MKT over MP's line between San Antonio and Corpus Christi, TX. The record shows that, after consolidation, applicants are likely to downgrade the MKT-MP interchange both for Mexican traffic via the Laredo gateway and for traffic moving via the port of Corpus Christi. Moreover, the only viable routing that would permit MKT to compete for this traffic independent of MP—interchange with SP at Denison, TX—is clearly unsatisfactory: it would substitute an unwieldly 3 line haul (MKT-SP-TM) for MKT's current 2 line haul to Laredo, and it would leave MKT with an interchange partner, SP, which has shown no interest in developing interchange traffic to either Laredo or Corpus Christi. A grant of MKT's trackage rights request to Corpus Christi would restore its ability to compete for traffic both to that port and, in joint line service with TM, to Mexico.

Second, I would have imposed a limited ratemaking condition requiring MP to concur with BN on joint rates on coal routed via Kansas City to power plants at Oologah, OK, Nearman, KS, Fort Gibson, OK, White Bluff, AR, and Newark, AR.* Absent this condition, the utilities operating these plants will remain subject to a railroad monopoly on coal moving from the Powder River Basin—even after CNW begins competitive service there.

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* In the absence of this ratemaking condition, I would have supported a grant of BN's proposal for trackage rights to the Oklahoma Gas & Electric Company's plant at Fort Gibson, OK. These rights were supported by OG&E and did not present the operational problems of BN's other trackage rights requests.

My colleagues all recognize that these five utilities will be subject to the monopoly power of the consolidated system; they merely find that this monopoly power was not caused by the consolidation. They believe that MP holds its monopoly power because it is the only carrier serving each power plant, and that MP does not gain any increased monopoly power when it obtains access to the coal mines serving those plants.

Most of the utilities' plight does indeed come from their complete dependence on MP for coal deliveries. I am nonetheless convinced, as was the Department of Transportation, that in the absence of the UP-MP consolidation these utilities would be able to gain some benefit from the competition CNW/UP will bring to coal origins in the Powder River Basin. Accordingly, it would be appropriate to impose a limited ratemaking condition that would protect that benefit without imposing an undue burden on the consolidated system.

Finally, I agree with Chairman Taylor that review and removal of the Bieber route condition could better be accomplished in a reopened *Northern Lines* proceeding than in this case.

OFFICE OF CHAIRMAN TAYLOR

Finance Docket No. 30,000

UNION PACIFIC RAILROAD COMPANY—CONTROL—MISSOURI PACIFIC CORPORATION AND MISSOURI PACIFIC RAILROAD COMPANY, ET AL.

October 1, 1982

MEMORANDUM TO THE COMMISSION:

Please show me with the following separate expression.

/s/ Reese H. Taylor, Jr.
REESE H. TAYLOR, JR.

cc: Clearance Unit
Director Hardy
Deputy Director Gitomer

Chairman Taylor concurring:

I endorse completely our decision to approve the primary and related applications with appropriate conditions, thereby allowing this consolidation to go forward. With this decision, I believe the Commission has given sanction to an important private sector proposal that should substantially enhance efficiency and competition while providing improved service to shippers.

However, in my opinion, there are two limited instances where the approved conditions do not go far enough to ameliorate anticompetitive consequences of the consolidation. More specifically, we should have granted the requested MKT trackage rights between San Antonio and Corpus Christi, and we should have imposed a limited

rate condition allowing the BN to quote rates over the MP for movements of coal to five existing power plants.

The MKT request for trackage rights to Corpus Christi is supported by the Departments of Transportation and Agriculture and by a number of affected shippers. Approval of these rights would insure MKT's continued ability to participate in traffic moving to or from Mexico. MP has been MKT's traditional connection for traffic to Mexico, but applicants have acknowledged that as a result of the consolidation, more emphasis will be placed on the MP-UP connection. MP may not continue to cooperate in MKT interchange traffic.

While interchange with SP at Denison, TX is available, historically this has not been a good alternative, because SP has shown no interest in handling this traffic. Imposition of the trackage rights to Corpus Christi would provide MKT direct access to TM for service to Mexico, as well as access to the Gulf at Corpus Christi.

Moreover, the San Antonio-Corpus Christi trackage rights would involve only minimal operating problems. Applicants' own operating plan shows a decrease of traffic into San Antonio and Corpus Christi, and MKT requested the use of only two of MP's tracks at the Viola Yard in Corpus Christi, which could be changed from day to day at applicants' discretion. The carriers also could negotiate the construction of tracks, if necessary, or MKT could make use of other tracks in Viola Yard.

I am also concerned over the failure of the Commission to preserve the potential for competition on Powder River Basin coal movements to five existing power plants located on the MP. We authorized the entrance of the CNW into the Powder River Basin in anticipation that CNW and UP would cooperate in the movement of coal and create a potential for origin competition between the existing BN service and the approved CNW-UP service. The expectation of this competition now exists for move-

ments of coal at least as far east as Kansas City, the eastern terminus of the UP. Coincidentally, Kansas City is also the present interchange point for BN-MP joint line service to the five power plants.

The decision here asserts that the five specific utilities will be able to negotiate in the same manner with the consolidated system as they might presently with the individual carriers, and that as a result, no competitive loss will occur because of the consolidation. But applicants themselves have conceded that once the consolidation is approved, BN will be able to compete on coal moving from the Powder River Basin to the MP-served utilities only if MP is willing to compete against itself. The Department of Transportation also recognized this problem in its support of the BN trackage rights, and even the Department of Justice did not oppose imposition of those rights. The Commission should preserve the opportunity for competition from the Powder River Basin.

Unfortunately, the operating problems resulting from a grant of the BN trackage rights would weigh heavily against the public benefits of the consolidation. Therefore, I favor the imposition of a limited rate condition allowing BN to quote rates for the joint line movement of coal over the MP to the five existing utilities, but not to any other utility plants that may be subsequently located along the MP line.

As with the proposed trackage rights, the limited rate condition would take effect only upon CNW's entrance into the Powder River Basin. Unlike the trackage-rights, the condition would not be overly burdensome on the MP, but would result in preserving the potential for competition in coal transportation to the five utility plants.

There remains only one other matter that deserves attention. Although I agree that changed circumstances make a review of the Bieber conditions advisable, that review should take place in a reopened *Northern Lines*

proceeding, the case in which those conditions were imposed.[1] In my opinion, this proceeding does not constitute the proper vehicle for removing the conditions.

[1] The Commission followed a similar procedure in *Soo Line R. Co.—Petition For Exemption*, 366 I.C.C. 286 (1982) which dealt with an exemption petition under 49 U.S.C. 10505 for a transaction proposed under 49 U.S.C. 11344(d).

APPENDIX H

Nos. 82-2253, 82-2323, 82-2342, 82-2370, 82-2371, 82-2418, 82-2430, and 82-2479

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOUTHERN PACIFIC TRANSPORTATION CO., ET AL.
DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
EDWARD K. WHEELER,
KANSAS CITY SOUTHERN RAILWAY CO., ET AL.,
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES, ET AL.,
AMERICAN TRAIN DISPATCHERS ASSOCIATION, and
ATCHISON, TOPEKA & SANTA FE RAILWAY CO.,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

and

UNION PACIFIC CORPORATION, ET AL.,
CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY,
and DENVER & RIO GRANDE WESTERN RAILROAD CO.,
Intervening Respondents

On Petitions to Review Orders of the
Interstate Commerce Commission

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA

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Washington, D.C. 20423

March 1983

* * * *

[35] protect CNW's Chicago gateway and to permit CNW to compete more effectively and efficiently with the consolidated system for traffic moving between various points in the midwest and Kansas City.

Petitioner KCS challenges the Commission's predictive judgments in the area of estimation of public benefits. Petitioners SP, ATSF and DRGW challenge the adequacy of the Commission's appraisal of the competitive effects of the consolidation as conditioned. Finally, petitioners KCS and DRGW challenge the Commission's refusal to impose conditions which they sought. We shall deal with these various arguments of petitioners seriatum.

A. *The Commission Properly Concluded The Consolidation Would Benefit The Public*

KCS's assault upon the Commission's estimate of $47 million in efficiency related public benefits (KCS Br. 17-53) overlooks the fact that a principal basis for the Commission's conclusion that the consolidation would benefit the public was that it would extend "efficient single system rail service between regions and markets which either have no such service at present or which have no competitive alternatives to the service that already exists" (366 I.C.C. at 489; see also 366 I.C.C. at 496). The "significant" but unquantified and unquantifiable benefits of single system service formed the basis for DOJ's non-opposition to approval of the consolidation provided DRGW was given, as it was, independent access to Kansas City (366 I.C.C. at 475). These benefits, without any attempt as was undertaken [36] here, to quantify efficiency related public benefits, formed the basis for the Commission's approval, affirmed by the United States Court of Appeals for the Fifth Circuit, of the BN-Frisco merger. Yet KCS ignores this most significant element of the Commission's public benefit finding and addresses the issue as if by discrediting some portion of the Com-

mission's efficiency related estimate it would undermine the Commission's conclusion that approval of the consolidation would benefit the public.

In any event, KSC's attempts to discredit the Commission's efficiency related estimate of public benefits are unpersuasive and should be rejected by this Court.[18]

1. KCS supplies no basis for its novel contention (KCS Br. 26-27) that the $47 million annual public benefit should be discounted to $34.6 million because it will not be fully realized until six years after consummation and indeed there is none. Discounting a future cash price to present value when payment is to be made now is an accepted economic practice as the Commission recognized in connection with its valuation of WP securities (366 I.C.C. at 638). Here there is no present payment or "dollar in hand." KCS Br. at 26.

* * * *

[18] We accept that there are minor mathematical or typographical errors in the Commission's charts, as charged by KCS (KCS Br. at 25). This would not be surprising in any statistical work of this size. (366 I.C.C. at 779-91). We note that KCS has itself found it necessary to correct Appendix C to its brief, "Tabulation of Errors." KCS recently filed an "Errata" statement indicating that twelve of the fourteen pages in that Appendix contain errors.

(3) (2) (2)

Nos. 84-621, 84-633, 84-641

Office-Supreme Court, U.S.
FILED
JAN 11 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
EDWARD K. WHEELER, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
THE INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, MISSOURI PACIFIC CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY AND THE WESTERN PACIFIC RAILROAD COMPANY IN OPPOSITION TO PETITIONS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Nos. 84-621, 84-633, 84-641

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
EDWARD K. WHEELER, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
THE INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, MISSOURI PACIFIC CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY AND THE WESTERN PACIFIC RAILROAD COMPANY IN OPPOSITION TO PETITIONS

Respondents Union Pacific Corporation, Union Pacific Railroad Company (collectively, "Union Pacific"), Missouri Pacific Corporation, Missouri Pacific Railroad Company (collectively, "Missouri Pacific") and The Western Pacific Railroad Company, intervenors in the court below and referred to herein as "respondents," submit this brief in opposition to the petitions for certiorari filed by Kansas City Southern Railway Company and Louisiana & Arkansas Railway Company (collectively, "KCS"), the Brotherhood of Maintenance of Way Employes

and various other rail labor unions (collectively, "the labor parties"), and Edward K. Wheeler.[1]

STATEMENT OF THE CASE

On December 22, 1982, after Chief Justice Burger had denied several applications for stay,[2] Union Pacific acquired control of Missouri Pacific and Western Pacific, and thereby created a single, consolidated railroad.[3] Since then, the facilities, operations and managements of the three companies have been integrated, and the consolidated system has been offering "single-system service" to shippers in the western United States.

These transactions were authorized by an order and decision of the Interstate Commerce Commission, served October 20, 1982, which petitioners challenged unsuccessfully below.[4] App. 39a *et seq.*; see generally 49 U.S.C. § 11343 (Supp. IV 1980), App. 639a. After extensive administrative proceedings, in which the Antitrust Division of the Department of Justice, the Department of Transportation and numerous state governments participated, the ICC determined in a 360-page decision that the consolidations, as conditioned, would be in the public

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[1] Respondents' parents, subsidiaries and affiliates are identified in the Appendix to this brief.

[2] Atchison, Topeka and Santa Fe Railway Co., *et al.* v. Interstate Commerce Commission, Nos. A-544, A-545 and A-546 (Dec. 22, 1982) (Burger, C.J.). That decision was subsequently embraced by the entire Court. See 51 U.S.L.W. 3507 (U.S. Jan. 11, 1983).

[3] Union Pacific obtained 77 percent of Western Pacific's stock in a tender offer of $20 per share that expired in March 1980; those shares remained in an independent voting trust until December 22, 1982. (Union Pacific had previously acquired 9.9 percent of Western Pacific's stock in open market purchases.) In May 1983, Union Pacific acquired the balance of the outstanding Western Pacific stock for $20 per share through a merger approved by the ICC. Union Pacific acquired Missouri Pacific through a stock exchange approved by the companies' shareholders in April 1980.

[4] The ICC's principal opinion was joined by five of the ICC's six Commissioners. Chairman Taylor and Commissioner Simmons also filed concurrences indicating their approval notwithstanding their preference for conditions sought by the Missouri-Kansas-Texas ("MKT") and Burlington Northern railroads that did not receive majority support. Neither of those railroads submitted briefs below in opposition to the ICC's order.

interest, and it found substantial public benefits arising from better service, more efficient operations, enhanced competition, improved job security for employees, and higher levels of employment. *E.g.*, App. 84a *et seq.* The ICC also determined that the terms of the transactions were fair to respondents' shareholders. *E.g.*, App. 298a *et seq.*[5] The ICC subsequently denied several requests for rehearing, and it actively opposed all efforts to stay the effectiveness of its order.[6]

The various petitions for review of the ICC's order were consolidated for decision in the D.C. Circuit Court. The transactions were consummated several weeks later, after that court (Circuit Judges Mikva and Scalia) and Chief Justice Burger had denied petitioners' requests for stay. Thereafter, in a *per curiam* opinion, Circuit Judges Wright, Mikva and Bork affirmed the Commission's decision in all relevant respects.[7]

Summary Of Petitions

Petitioners raise here several discrete issues, none of which was a significant factor in the proceedings before the ICC or the

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[5] The Commission imposed several conditions to maintain the level of competition in the new system's market areas (trackage rights for the Southern Pacific, Denver & Rio Grande Western ("DRGW") and MKT railroads), and it approved respondents' settlements with Conrail and the Chicago & North Western Transportation Company.

[6] The ICC's approval of the consolidations was consistent with recent federal initiatives encouraging end-to-end rail consolidations. For example, the Railroad Revitalization and Regulatory Reform Act of 1976 endorsed "efforts to restructure [the national railway] system on a more economically justified basis." Pub. L. No. 94-210, § 101(a)(2), 90 Stat. 31, 33 (1976). This legislation was followed by the ICC's development of general policy statements reflecting the congressional policy, and by the ICC's subsequent approval of several rail consolidations similar in nature and scope to those approved here. See Railroad Consolidation Procedures, 359 I.C.C. 195 (1978); Railroad Consolidation Procedures, General Policy Statement, 363 I.C.C. 784 (1981).

[7] The Court remanded to the ICC for further consideration of one discrete issue. See App. 32a-33a. That issue concerned the Commission's denial of DRGW's request for a condition affording it "independent rate-making authority" over the Western Pacific portion of the consolidated system. After additional briefing, that issue is now awaiting decision by the ICC.

affirmance below of the Commission's decision. While ten railroad protestants challenged the transactions at various stages below, only KCS has sought review of the Court of Appeals' decision. A highly successful railroad not threatened by the consolidations (App. 243a), KCS has acknowledged that its objective in the proceedings was "personal aggrandizement at the expense of the merging parties."[8] It asked the Commission to expand its system by imposing as conditions to the consolidations trackage rights over nearly 1,000 miles of Missouri Pacific lines; KCS admitted that such rights were totally unrelated to the competitive impact of the consolidations. See App. 28a. The ICC's denial of that request is the principal focus of KCS' petition.

The labor parties' interest here is no more compelling. The ICC found that the approved transactions "will directly benefit labor both by producing a substantial net increase in existing and future employment opportunities and by increasing the job security of their present employees" (App. 277a); nonetheless, the Commission imposed very generous labor protective conditions that obviate any adverse impact of the approved transactions on respondent employees.[9] App. 281a. The D.C. Circuit Court affirmed the Commission's refusal to expand the scope of that labor protection in a decision that recognized the 44 years of consistent ICC decisions on this issue. The Second, Fifth and Seventh Circuit Courts have reached the same result in the last five years.

While several dissenting shareholders challenged the transactions before the ICC, only petitioner Wheeler, a dissenting Western Pacific shareholder, continues to challenge the ICC's

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[8] Transcript of ICC Oral Argument, at 180-81.

[9] These conditions afford adversely affected employees generous displacement allowances, dismissal allowances and fringe benefits for an extended period after implementation of the transactions. See generally, New York Dock Ry.—Control—Brooklyn Eastern District, 366 I.C.C. 60 (1979); Norfolk and Western Ry. Co.—Trackage Rights—BN, 354 I.C.C. 605 (1978), as modified by Mendocino Coast Ry., Inc.—Lease and Operate, 360 I.C.C. 653, 664 (1980).

finding that $20 per share was a fair price for Western Pacific. Wheeler makes this challenge notwithstanding (1) that the D.C. Circuit Court, after a thorough and detailed analysis, squarely rejected each of his arguments; (2) that the $20 price represented a substantial premium over the market price of Western Pacific stock at the time of the acquisition agreement; (3) that the ICC had valued Western Pacific at 50 percent of the offering price only one year before the acquisition agreement; and (4) that appraisal proceedings addressing the value of Western Pacific's stock have been initiated in Delaware state court by dissenting Western Pacific shareholders.

SUMMARY OF ARGUMENT

The decision below is fully consistent with every relevant Supreme Court and Court of Appeals decision addressing the issues presented, none of which involves an unsettled question of federal law. Accordingly, the petitions fail to satisfy this Court's traditional criteria for review.

While KCS contends that the Interstate Commerce Commission should "act as a roving ombudsman restructuring railroads on its own" whenever a consolidation application is submitted for review (see p. 7, below), its position has absolutely no legal support. The D.C. Circuit Court correctly determined that the ICC's rejection of KCS' request for a market extension unrelated to the approved transaction was well within the scope of its discretion.

The ICC's Order approving the transactions was endorsed by a majority of the ICC's six Commissioners. The concurring votes of two Commissioners—both of whom expressly approved the ICC's Order in their separate concurring opinions—cannot be read as constructive "dissents," as KCS contends.

The D.C. Circuit Court properly declined KCS' invitation to substitute its judgment for the judgment of the Commission on a variety of highly technical, quantitative issues. The court below expressly and properly applied the standard of review prescribed by the Administrative Procedure Act and this

Court's precedents. Its affirmance of the Commission's calculation of the public benefits generated by the consolidations does not warrant further review.

Pursuant to its statutory obligations, the ICC imposed for the benefit of adversely affected applicant employees very generous labor protective conditions. The ICC was not obligated to impose protective conditions for the benefit of other railroads' employees adversely affected by the approved transactions. The Second, Fifth, Seventh and D.C. Circuit Courts have all recently held that the conditions imposed by the ICC fully satisfy the governing statute. There is no basis for this Court to review that consistent line of Circuit Court precedent.

The factual issue presented by Wheeler—whether $20 per share was a reasonable price for Western Pacific—does not warrant further review in light of the Court of Appeals' holdings (1) that the ICC's "methodology of valuation is reasonable," (2) that the ICC's "conclusions are supported by substantial evidence in the record," and (3) that the transaction was the result of "arm's length negotiations." App. 36a-37a.

REASONS FOR DENYING THE WRIT

None of the issues presented satisfies this Court's traditional criteria for certiorari. The D.C. Circuit Court's decision is fully consistent with every relevant Supreme Court and Court of Appeals decision addressing the issues presented. Moreover, on almost every issue, the ICC decision affirmed by the Court of Appeals followed consistent and longstanding administrative constructions of the relevant statutes; none of the issues presented involves unsettled questions of federal law. Under these circumstances, the petitions present no basis for this Court's review.

KCS

1. The issues presented by KCS are simple and straightforward. First, with scarcely a mention of the D.C. Circuit's analysis (App. 27a-29a), KCS complains that the ICC erred in

refusing to grant its request for a market extension that KCS admitted has no relationship to the competitive impact of the consolidations. Pet. 9-16. See App. 243a; p. 4, above. The issue presented by KCS is thus one of transportation policy: whether, in the context of rail merger proceedings, the Commission should "act as a roving ombudsman restructuring railroads on its own." App. 29a. While KCS argues that "rove [the ICC] must" (Pet. 15), its position has no support in judicial or administrative precedent or in the relevant statutes. And there certainly is no reason for this Court to address that policy issue, which Congress and the ICC have already resolved in a manner contrary to KCS' position.

The ICC's requirement that conditions be "related to the impact of the consolidation" was developed in rulemaking proceedings addressing public interest standards for conditioning proposed consolidations. *Railroad Consolidation Procedures, General Policy Statement,* 363 I.C.C. 784, 792 (1981). For that reason, the ICC could have "barr[ed] at the threshold" KCS' request.[10] *Federal Power Commission* v. *Texaco,* 377 U.S. 33, 39 (1964); *accord, United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 205 (1956). Nonetheless, the Commission evaluated the merits of KCS' proposed change in its policy and, in a thorough and well reasoned analysis, determined that such a change was not consistent with the public interest, a view shared by the Departments of Justice and Transportation. See App. 194a-197a.

In response to the unanimous conclusions of the D.C. Circuit Court, the ICC, and the Departments of Justice and Transportation, KCS argues only that denial of its requested market extensions frustrates the "procompetitive policy" of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980). Pet. 9. But by its very terms, the Staggers Act does not apply to applications—including those in this proceeding—that were pending before the ICC prior to October 1, 1980: such

[10] This is particularly true here, for KCS opted not to participate in the Commission's rule-making proceeding (*Railroad Consolidation Procedures, supra,* 363 I.C.C. at 784-85), even though it had an opportunity to do so after respondents' consolidation applications were filed.

applications "shall be adjudicated or determined as if this Act had not been enacted." *Id.*, § 228(e), 94 Stat. at 1934.[11] Because KCS' entire position rests on its strained reading of a statute that the ICC was not required to apply, there simply is no relevant issue presented here for review.

In any event, the substance of KCS' argument badly distorts the Staggers Act. According to KCS, "this *new* policy imposes a *new* burden on the Commission in protecting the public interest in merger proceedings." Pet. 11 (emphasis added). But the legislative history of the Act confirms that it "would make *no changes* in the present law with respect to major rail mergers: the ICC would consider such proposals under existing standards." H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 120 (1980) (emphasis added), *reprinted in* 1980 U.S. Code Cong. & Ad. News, 96th Cong. 4152. If anything, the Staggers Act's emphasis on deregulation refutes the notion that Congress intended government action to displace private initiative as the vehicle for restructuring the nation's rail system. As the D.C. Circuit Court correctly held, KCS' requests for market extensions were properly denied by the ICC. Further review of that underlying policy judgment is not warranted.

2. KCS next contends that the ICC order approving the transactions was "not approved by a majority of Commissioners." With an Alice-in-Wonderland perspective, KCS ignores the fact that five of the six ICC Commissioners enthusiastically endorsed the Decision and Order. Accordingly, this issue, which has virtually no legal substance, does not warrant further review.[12]

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[11] Even though it was not required to do so, the ICC in fact followed the Staggers Act policies in evaluating the consolidations. The ICC's opinion confirmed that "[w]hile the Staggers Act itself is not applicable to this proceeding, the policies set forth in 49 U.S.C. § 11344(b)(5) (1980) as a codification of prior law will be followed." App. 78a. Thus, the court below noted that the ICC merely "elected to adhere to . . . [the Staggers Act's] policies." App. 14a.

[12] As a preliminary matter, it bears emphasis that KCS failed to present this issue to the ICC for its consideration, thus violating its obligation to

(footnote continues)

Without reservation, three of the ICC's six Commissioners (Vice Chairman Gilliam and Commissioners Sterrett and Gradison) joined the Commission's opinion approving the transactions, subject to conditions accepted by respondents. Chairman Taylor and Commissioner Simmons each filed a concurring opinion indicating that notwithstanding his preference for additional conditions, the consolidations as conditioned by the ICC's Order are consistent with the public interest and should be approved. See p. 2 n.4, above. Thus, five of the ICC's six Commissioners endorsed the approval order.

KCS' efforts to convert these two Commissioners' affirmative votes into constructive "dissents" is refuted by the language of their opinions. Thus, addressing the principal ICC decision, Chairman Taylor concluded:

> "I endorse completely our decision to approve the primary and related applications with appropriate conditions, thereby allowing this consolidation to go forward."

App. 315a.[13] *Accord,* App. 321a-322a (concurrence of Commissioner Simmons). That should put an end to this issue.[14]

(footnote continued)

exhaust administrative remedies. *E.g.,* Unemployment Compensation Commission v. Aragon, 329 U.S. 143, 155 & n.15 (1946); see 49 C.F.R. § 1100.98(f) (1981). This omission is particularly egregious here because the issue presented by KCS—whether the Commission incorrectly "tallied" the votes of two of its six Commissioners—was uniquely capable of being clarified by the ICC.

[13] Chairman Taylor reiterated those views in the ICC's order, served November 18, 1982, denying various motions for stay: "[T]he Commission's conclusions and findings are correct in all material matters of fact and law." Neither he nor Commissioner Simmons dissented from that order or from the ICC's subsequent order, served November 24, 1982, again refusing to delay the approved consolidations. These votes demonstrate that there is no basis for KCS' claim that the affirmative votes of Commissioners Taylor and Simmons should be construed as dissents. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 862 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971).

[14] KCS' position that the Commissioners should be bound by their initial preferences for other conditions is frivolous. Union Pacific Railroad Company v. United States, 637 F.2d 764, 767 (10th Cir. 1981); *accord,* Persian Gulf Outward Freight Conference v. FMC, 361 F.2d 80, 84 (D.C. Cir. 1966).

(footnote continues)

3. As its last argument, KCS continues to press its claim that the ICC erred in calculating the precise amount of public benefits generated by the approved transactions. Pet. 19-24. While KCS couches its petition in terms of the standard of review, it seeks here merely to relitigate a variety of highly technical, quantitative issues that were tangential to the result reached by the Commission. The court below properly declined KCS' invitation to substitute its judgment on these complex issues for that of the Commission. It recognized that its obligation under the Administrative Procedure Act was not

> "to re-weigh the evidence or to draw our own inferences from the evidence before the Commission. . . . We can ask only whether the Commission has observed the statutory limits that Congress has set for its discretion, whether its action was arbitrary or capricious, or whether its findings are supported by adequate analysis and substantial evidence in the record considered as a whole." [15]

There can be no serious question that this standard was appropriate and fully consistent with this Court's precedents. *E.g., Bowman Transportation, Inc.* v. *Arkansas Best Freight System,* 419 U.S. 281, 285 (1974); *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 416 (1971).[16]

(footnote continued)

There is also no support for KCS' position (Pet. 19) that the concurring opinions should be disregarded because they were not introduced at a formal, "collective" voting conference of the ICC. See, *e.g.,* T.S.C. Motor Freight Lines, Inc. v. United States, 186 F. Supp. 777, 785-86 (S.D. Tex. 1960), *aff'd sub nom.* Herring Transp. Co. v. United States, 366 U.S. 419 (1961) (addressing notation voting system).

[15] App. 12a, *quoting* Missouri-Kansas-Texas Railroad Co. v. United States, 632 F.2d 392, 399-400 (5th Cir. 1980), *cert. denied,* 451 U.S. 1017 (1981).

[16] KCS fails even to acknowledge the D.C. Circuit Court's explicit discussion (App. 12a) of the standard of review. Moreover, KCS' suggestion that the D.C. Circuit applied a different standard—a so-called "independent judgment test"—is disingenous. KCS Pet. 20. The D.C. Circuit did indeed find that the ICC had exercised "independent judgment" in evaluating the administrative record. App. 24a. But that finding was directly responsive to KCS' arguments below that the ICC had not exercised independent judgment in calculating the public benefits. See, *e.g.,* KCS Br. at 51 ("The ICC's findings [are] based solely on the costing approach taken by the UP parties").

The Labor Parties

Pursuant to its statutory obligation, the ICC considered "the interest of carrier employees affected by the proposed transaction," and imposed for the benefit of displaced applicant employees substantial protective conditions. App. 276a *et seq.*; 49 U.S.C. § 11344(b)(4) (Supp. IV 1980), App. 642a; see 49 U.S.C. § 11347 (Supp. IV 1980). See also p. 4 n. 9, above. The federal courts of appeals consistently have held that these conditions, known as the *New York Dock* conditions, fully satisfy the pertinent statutes. *E.g., Brotherhood of Maintenance of Way Employees* v. *ICC*, 698 F.2d 315 (7th Cir. 1983).

The labor unions challenged below the ICC's refusal (App. 200a) to extend the *New York Dock* conditions to employees of non-applicant carriers allegedly affected by the consolidations; the Court of Appeals sustained that decision. App. 34a; *accord, Lamoille Valley Railroad Co.* v. *ICC*, 711 F.2d 295, 323-24 (D.C. Cir. 1983).[17] This is by no means a novel issue. The unions have "urged [this] broader interpretation upon the Commission and reviewing courts since 1946 . . . ." *Missouri-Kansas-Texas Railroad Co.* v. *United States*, 632 F.2d 392, 411 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981). In the last five years alone, the Second, Fifth and Seventh Circuit Courts, as well as the D.C. Circuit Court, have firmly and unambiguously refused to expand the scope of the *New York Dock* protections. *Id.* at 411-13 ("We affirm the Commission's view that § 11347 requires protection only for employees of the merging carriers"); see *Brotherhood of Maintenance of Way Employees* v. *ICC, supra*, 698 F.2d at 318 (the arguments "do not become more convincing by reiteration"); *New York Dock Railway Co.* v. *United States*, 609 F.2d 83, 91-101 (2d Cir. 1979). There is no reason for this Court to review this consistent and longstanding rule of law.

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[17] In *Lamoille Valley*, the D.C. Circuit Court recognized that the Commission had "consistently interpreted § 11347, since its original enactment in 1940, to exclude employees of non-applicant railroads." 711 F.2d at 323-24. In addition to recognizing the deference due this long-standing administrative interpretation, the court held that the ICC's consistent view of the statute reflected a "sensible" interpretation of its language that was "strongly support[ed]" by the legislative history, as well as "by considerations of practicality and administrative economy." *Id.*

Wheeler

The issue presented by petitioner Wheeler is essentially a factual question: whether $20 per share was a reasonable price for Western Pacific. After careful review and analysis, the ICC determined that the $20 per share "price to be paid for WPRR stock under the merger agreement is fair and reasonable." App. 298a-306a. The Court of Appeals concluded that "the Commission's methodology of valuation is reasonable and that its conclusions are supported by substantial evidence in the record." App. 36a.[18] There is no conceivable basis for this Court to review that finding.

The underlying issue presented by Wheeler is now pending before the Chancery Court in Delaware, where dissenting Western Pacific shareholders have sought appraisal rights afforded by Delaware law.[19] Union Pacific agreed at the time of the transaction not to object to dissenting shareholders' pursuing whatever appraisal remedies they might have under state law. See *Schwabacher* v. *United States,* 334 U.S. 182, 201 (1948). Therefore, even if the ICC, the Court of Appeals, Western Pacific's management and Salomon Brothers all erred in concluding that the price was fair, dissenting shareholders who pursue their remedies in Delaware presumably would not be "deprive[d] . . . of just and reasonable compensation for [their] property," as Wheeler alleges. Pet. 6.[20]

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[18] The "substantial evidence" to which the Court referred included the opinion of Salomon Brothers, Western Pacific's financial advisers, that the price was fair (App. 298a-299a), and the fact that the $20 per share offer represented a 38 percent premium over the market price for Western Pacific stock on the day before public announcement of the transaction (App. 305a). In addition, the ICC had valued the shares of Western Pacific at $10 per share only a year before the agreement. See Newrail Co.-Purchase-Western Pacific R.R., 354 I.C.C. 885, 890, 893, 899-901 (1978). Wheeler was Western Pacific's counsel in *Newrail,* where he urged the ICC to endorse the $10 per share valuation. See *id.* at 885.

[19] Rogers, *et al.* v. Western Pacific Railroad Co. and Union Pacific Railroad Co., C.A. No. 7274 (Del. Ch. Ct., Newcastle County); Bruno v. Western Pacific Railroad Co., C.A. No. 7250 (Del. Ch. Ct., Newcastle County).

[20] Under Delaware law, shareholders exercising such appraisal rights are entitled to receive the "fair value" of their equity. Del. Code Ann., tit. 8,

(footnote continues)

Wheeler's petition selectively repeats the points that he advanced below, where he argued that the ICC had unreasonably disregarded Western Pacific's land holdings in evaluating the fairness of Union Pacific's tender offer. Pet. 6-12. But as the Court of Appeals recognized, the "Commission did not simply disregard WP's landholdings. Rather, it stated that such holdings are relatively unimportant in the context of the [capitalized earnings] methodology the Commission used in determining a reasonable range of prices for WP's stock." App. 37a; see App. 302a-303a. And, as the court also acknowledged, the capitalized earnings approach has been used in many prior proceedings to evaluate the reasonableness of proposed transactions.[21] While Wheeler contends that this approach represents a departure from prior Commission practice (Pet. 9-12), his claim is wrong, as demonstrated by the very authorities on which he relies. See, *e.g.*, *Seaboard Air Line Railroad Co. —Merger—Atlantic Coast Line*, 320 I.C.C. 122, 190 (1963) ("the physical values of the railroad properties are not controlling, for under the Schwabacher principle, the predominant factor is the earnings of the properties rather than their values"); see Pet. 9.

The Court of Appeals correctly recognized that

> "although the Commission in fulfilling its statutory responsibilities is to carefully review all of the terms of a merger proposal and determine whether they are just and reasonable, it is not for the agency, much less the courts, to dictate the terms of the merger agreement once this standard has been met."

(footnote continued)

§ 262 (a) (Supp. 1981). Fair value is determined by taking into consideration all the elements of value. Application of Delaware Racing Ass'n, 42 Del. Ch. 175, 206 (Del. 1965). Recently, in Weinberger v. UOP, Inc., 457 A.2d 701 (Del. Supr. 1983), the Delaware Supreme Court endorsed a "liberal approach [to appraisal proceedings which] must include proof of value by any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court . . . ."

[21] App. 37a, citing Seaboard World Airlines, Inc. v. Tiger International, Inc., 600 F.2d 355, 361-62 (2d Cir. 1979) and Mills v. Electric Auto-Lite Co., 552 F.2d 1239, 1247-49 (7th Cir.), *cert. denied*, 434 U.S. 922 (1977).

App. 37a-38a, quoting *Northern Lines Merger Cases*, 396 U.S. 491, 520 (1970). This is particularly true in circumstances, such as those presented here, where the reviewing court has affirmed the agency's finding that the transaction was the result of "arm's length negotiations" (App. 37a). This Court should reject Wheeler's invitation further to review the Commission's factual determination that $20 per share was a fair price for the Western Pacific stock.

CONCLUSION

For the reasons stated, the petitions for writs of certiorari should be denied.

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APPENDIX

APPENDIX

Set forth below, pursuant to Rule 28.1, is a list of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Respondents Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Corporation, Missouri Pacific Railroad Company, and The Western Pacific Railroad Company:

Alameda Belt Line
The Alton & Southern Railway Company
Arkansas & Memphis Railway Bridge and Terminal Company
Bear Creak Uranium Company
The Belt Railway Company of Chicago
Black Butte Coal Company
Brownsville & Matamoros Bridge Company
Camas Prairie Railroad Company
Carbon County Coal Company
Central California Traction Company
Chicago and Western Indiana Railroad Company
Corpus Christi Petrochemical Company
The Denver Union Terminal Railway Company
Esperanza Pipeline Company
Ferguson-Burleson County Gas Gathering System
Frontier Pipeline
Galveston, Houston and Henderson Railroad Company
Great Southwest Railroad, Inc.
Houston Belt & Terminal Railway Company
Jefferson Southwestern Railroad Company
Kansas City Terminal Railway Company
Longview Switching Company
M-C Carbon Partnership
Medicine Bow Coal Company
Milne Point Pipeline, Inc.
Oakland Terminal Railway
The Ogden Union Railway and Depot Company
Point Arguello Pipeline, Inc.

Portland Traction Company
Portland Terminal Railroad Company
The St. Joseph and Grand Island Railway Company
St. Joseph Terminal Railraod Company
Southern Illinois and Missouri Bridge Company
Stansbury Coal Company
Stauffer Chemical Company of Wyoming
Terminal Industrial Land Company
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
Trailer Train Company
Uinta Development Company
Union Pacific Resources Ltd.

(4) (3) (3)

Nos. 84-621, 84-633, and 84-641

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In the Supreme Court of the United States

OCTOBER TERM, 1984

KANSAS CITY SOUTHERN RAILWAY COMPANY, ET AL.,
PETITIONERS
v.
UNITED STATES OF AMERICA, ET AL.

EDWARD K. WHEELER, PETITIONER
v.
INTERSTATE COMMERCE COMMISSION, ET AL.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, ET AL.,
PETITIONERS
v.
UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a majority of the Interstate Commerce Commission approved the consolidation of these railroad holding companies.

2. Whether the court of appeals applied the proper standard of review in upholding the Commission's decision.

3. Whether the Commission and the court below properly concluded that the Commission is not required to impose conditions upon the merged railroad designed to increase competition if the conditions are not related to the anticompetitive effects of the merger.

4. Whether the Commission and the court of appeals correctly found that the Commission is required to provide protection only for employees of the railroads that are parties to the transaction.

5. Whether the court of appeals properly affirmed the Commission's finding that the price per share paid to minority shareholders pursuant to the merger was fair and reasonable.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-621

KANSAS CITY SOUTHERN RAILWAY COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 84-633

EDWARD K. WHEELER, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a[1]) is reported at 736 F.2d 708. The opinion of the Interstate Commerce Commission (Pet. App. 39a-615a) is reported at 366 I.C.C. 459.

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[1] "Pet. App." refers to the appendix filed by petitioners in No. 84-621.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1984. Petitions for rehearing were denied on July 20, 1984 (Pet. App. 621a-629a). The petitions for a writ of certiorari in No. 84-621 and 84-633 were filed on October 17 and 18, 1984, respectively. On August 2, 1984 the Chief Justice extended the time in which to file a petition for a writ of certiorari in No. 84-641 to and including October 19, 1984, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1980, Union Pacific Corporation (UPC), a railroad holding company, reached an agreement to acquire control of a second railroad holding company, Missouri Pacific Corporation (MP), and to merge with a third railroad holding company, Western Pacific Railroad Company (WP).[2] The parties filed applications with the Interstate Commerce Commission for authority to consummate these transactions pursuant to 49 U.S.C. 11343. Petitioners were among the numerous public and private parties who participated in the ensuing Commission proceeding.[3]

Petitioner Kansas City Southern Railway Company (KCS)[4] urged the Commission to deny the application filed by UPC and MP unless KCS received trackage rights over

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[2]These are the abbreviations that are used by the petitioners in No. 84-621 (Pet. ii n.*).

[3]Numerous railroads, shippers, governmental agencies (including the United States Department of Justice), state and local governments, stockholders, and labor organizations participated in the proceeding before the Commission (see Pet. App. 65a-77a). The proceeding lasted two years, involved ten months of oral hearings before two administrative law judges, and amassed a record consisting of over 18,000 pages of transcript and more than 600 exhibits (see *id.* at 5a-6a).

[4]The second petitioner in No. 84-621, Louisiana & Arkansas Railway Company, is a wholly-owned subsidiary of KCS.

certain MP railroad lines (Pet. App. 70a-71a, 240a). Trackage rights enable one railroad to operate over tracks owned by another railroad for a fee paid to the owner of the tracks. KCS argued that these rights were necessary both to offset what it asserted would be the anticompetitive effects of the consolidation and to enhance its inferior competitive position, which it conceded was unrelated to any anticompetitive effects of the consolidation (Pet. App. 70a-71a, 240a-242a).

Petitioners Brotherhood of Maintenance of Way Employes, et al. (BMWE),[5] argued (Pet. App. 76a) that railway labor interests would be harmed by the proposed consolidation. They advocated the imposition of conditions to protect not only the employees of the merging carriers but also employees of other railroads who might somehow be affected by the consolidation.

Petitioner Wheeler, a stockholder in WP, neither supported nor opposed the merger of UPC and WP. He argued that the price offered by UPC for the WP stock was neither fair nor reasonable (Pet. App. 299a-300a).

The Commission's review of the proposed consolidation was careful and complete (see Pet. App. 39a-615a). Pursuant to the standard contained in 49 U.S.C. 11344(b), the Commission examined the effect of the consolidation on the adequacy of transportation for the public, the effect on the public interest of including other railroads in the area in the proposed transactions, the total fixed charges that would result from the consolidation, and the interests of affected employees (Pet. App. 84a-105a, 276a-282a, 287a). The Commission thoroughly examined the competitive effects of the proposed transactions, and measured the proposals against the national transportation policy set

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[5]All of the petitioners in No. 84-641 are unions that represent railroad workers.

forth in 49 U.S.C. 10101a (Pet. App. 111a-168a, 358a-538a). The Commission also considered whether the transactions would cause any harm to any railroads' essential services (*id.* at 168a-172a). Finally, the Commission considered whether it should require the imposition of any conditions to protect the public or to protect other railroads (*id.* at 193a-250a).[6]

The Commission concluded that, provided certain conditions were imposed, the consolidation was consistent with the public interest (Pet. App. 55a-60a, 84a). It found that the consolidation would result in substantial public benefits without the loss of essential services (*id.* at 84a-104a, 168a-172a, 538a-594a). While some adverse competitive effects could have resulted from the consolidation (*id.* at 149a), the Commission determined that the grant of certain trackage rights to competing railroads would ameliorate the anticompetitive effects of the transactions (*id.* at 57a-58a, 220a, 229a-230a). The Commission did not require the granting of the trackage rights sought by petitioner KCS because it determined that the anticompetitive conditions cited by KCS did not result from the consolidation (*id.* at 240a-245a). The Commission concluded that employees' interests would be safeguarded by the "New York Dock Conditions" traditionally imposed for the protection of the employees of consolidating carriers, and declined to impose conditions to protect the employees of other railroads (*id.* at 276a-281a).[7]

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[6]The Commission addressed a number of other issues that are not relevant to petitioners' arguments in this Court. These issues include the effect of the Pacific Railroad Act, 45 U.S.C. 83, on the UPC/WP consolidation (Pet. App. 172a-193a); removal of certain traffic protective conditions (*id.* at 236a-238a); approval of certain settlements between various parties and the applicant railroads (*id.* at 250a-276a); and environmental considerations (*id.* at 282a-287a).

[7]The "New York Dock Conditions" refer to the labor protective conditions usually imposed by the Commission in rail mergers, which were developed by the Commission in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60, aff'd, 609 F.2d 83 (2d Cir. 1979).

Finally, the Commission concluded that the price to be paid by UPC for the WP stock was fair and reasonable (*id.* at 298a-306a).

2. The Commission and the court of appeals denied several motions for a stay of the Commission's decision approving the consolidation, except for a temporary stay to enable the parties to seek a stay from this Court (Pet. App. 12a n.5). The application for a stay filed by KCS in this Court was denied by the Chief Justice, and the transactions were consummated. The application subsequently was referred to Justice Stevens, who in turn referred it to the entire Court, which also denied the application for a stay.[8]

3. The court of appeals affirmed the Commission's decision in all respects relevant to petitioners' claims before this Court (Pet. App. 1a-38a).[9] The court first addressed the challenges to the Commission's determination that the consolidation was consistent with the public interest (*id.* at 13a-26a).[10] It concluded that the Commission had given

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[8]*Southern Pacific Transp. Co.* v. *ICC*, No. A-544 (Jan. 10, 1984); *Atchison, T. & S.F. Ry.* v. *ICC*, No. A-545 (Jan. 10, 1984); and *Kansas City S. Ry.* v. *ICC*, No. A-546 (Jan. 10, 1984).

[9]The court of appeals remanded the proceeding to the Commission "for further consideration and explanation" of the agency's refusal to grant the request of Denver & Rio Grande Western Railroad Company (DRGW) for independent ratemaking authority over WP's tracks between Utah and Northern California (Pet. App. 32a-33a). This authority would have required the merged railroad to adopt automatically the rate set by DRGW over certain routings. The Commission did not seek review of this decision, and has reopened the proceeding to again consider this issue. *Union Pacific—Control—Missouri Pac.—Western Pac.*, Finance Docket No. 30,000, (severed July 31, 1984) (not printed).

[10]The court of appeals did not address directly the contention of petitioner KCS (see pp. 7-9, *infra*) that the Commission did not approve the consolidation by a majority vote. However, this argument was the basis of KCS's application for a stay and its motion for summary

proper recognition to the role of competition in analyzing the consolidation (*id.* at 14a, 17a-19a). The court observed that "[t]he Commission has always, and should continue, to perform a balancing test which takes a myriad of factors —including competition—into consideration and weighs 'the potential benefits to applicants and the public against the potential harm to the public' " (*id.* at 18a (citation omitted)).

The court rejected contentions by various parties that the Commission's analysis of the public benefits flowing from the proposed consolidation was flawed (Pet. App. 22a-24a). The court accepted the cost figures used in the Commission's analysis (*id.* at 23a), noting that the Commission performed a searching and critical analysis of the methodology and cost data submitted by the parties and made appropriate adjustments which represented an "exercise[] [of] its independent judgment and expertise with respect to the calculation of public benefits" (*id.* at 24a). The court deferred to the Commission in this "fact-bound and technical area" (*ibid.* (footnote omitted)).

The court of appeals also approved the Commission's decision to impose certain conditions on the consolidation to ameliorate any anticompetitive effects (Pet. App. 24a-29a). It upheld the Commission's denial of petitioner KCS's request for trackage rights (*id.* at 27a-29a) that were "concededly unrelated to the consolidation at issue" and therefore "not designed to mitigate any anti-competitive consequences stemming directly from the consolidation" (*id.* at 28a). The court held (*id.* at 29a) that "the Commission is not required to act as a roving ombudsman restructuring railroads on its own in order to satisfy an individual carrier's notion of what effective competition may require."

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reversal, each of which was denied by the court of appeals. The court took note of these prior actions in its opinion on the merits (Pet. App. 12a n.5).

The court of appeals rejected the labor petitioners' challenge to the agency's refusal to extend the "New York Dock Conditions" to the employees of non-applicant carriers (Pet. App. 33a-34a). It based its decision on its prior holding in *Lamoille Valley R.R.* v. *ICC*, 711 F.2d 295, 323-324 (D.C. Cir. 1983), in which the court considered and rejected the same argument.

Finally, the court rejected petitioner Wheeler's challenge to the purchase price offered to WP stockholders. It concluded that the methodology used by the Commission to value the WP stock was reasonable and found that the Commission's conclusion that the offer for the stock was fair was supported by substantial evidence in the record (Pet. App. 35a-38a). In addition, the court concluded that there was substantial evidence to support the Commission's finding that the price resulted from arms' length negotiations between WP and UPC (*id.* at 37a). It held that the Commission took into account all relevant factors, including the enhanced value of the stock in light of the consolidation and WP's land holdings, in arriving at its independent judgment that the offer for the WP stock was fair (*ibid.*).

ARGUMENT

The detailed opinion of the court of appeals, upon which we rely, correctly affirmed the Commission's decision to approve the consolidation of the three railroads without imposing the additional conditions sought by petitioners. The fact-bound determinations challenged by petitioners do not conflict with any decision of this Court or of any other court of appeals. Therefore, further review is not warranted.

1. Petitioner KCS contends (84-621 Pet. 17-19) that a majority of the Commission did not approve the consolidation. The court below properly relegated this matter to the category of "[a]dditional, relatively minor, issues" as to

which the challenges to the Commission's decision were "without merit" (Pet. App. 13a).[11]

Three commissioners joined in the Commission's opinion without expressing any reservations (see Pet. App. 661a-666a). Chairman Taylor filed a concurring opinion that begins, "I endorse completely our decision to approve the primary and related applications with appropriate conditions, thereby allowing this consolidation to go forward" (Pet. App. 315a). Commissioner Simmons began his concurring opinion by stating: "I join in the Commission's decision to approve, with conditions, the consolidation of the Union Pacific, Missouri and Western Pacific rail systems" (Pet. App. 321a). Although both Chairman Taylor and Commissioner Simmons discussed some changes that might have been made in the Commission decision, they plainly endorsed the Commission decision. Thus, five of the six commissioners voted to approve the consolidation.[12]

KCS's argument is based upon the fact that the vote memoranda circulated by Chairman Taylor and Commissioner Simmons stated that they voted to approve the draft decision "subject to" suggested modifications (Pet. App. 656a, 657a). However, these memoranda, which are dated September 22 and 24, 1982, respectively, simply memorialize the results of a closed conference held on September 13, 1984 at which the Commission voted to *approve* the consolidations (see Pet. App. 653a). In light of this fact, and the subsequent issuance of the concurrences (Pet. App. 671a-674a), it is clear that notwithstanding their preference for

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[11]The court of appeals previously had rejected this argument when it denied KCS' request for a stay of the Commission's order. After the denial of the stay, KCS filed a motion for summary reversal based on this issue; that motion also was denied by the court of appeals. Pet. App. 12a n.5.

[12]Commissioner Andre dissented from the decision (see Pet. App. 323a).

additional conditions, Chairman Taylor and Commissioner Simmons each concluded that the consolidation, as conditioned in the Commission's opinion, was consistent with the public interest.[13]

2. KCS asserts (84-621 Pet. 19-24) that the court of appeals adopted an unduly deferential standard of review in upholding the Commission's determination that substantial public benefits would flow from the consolidation. However, at the outset of its analysis (Pet. App. 11a-12a), the court below set forth the standard of review, quoting from *Missouri-Kan.-Tex. R.R.* v. *United States*, 632 F.2d 392, 399-400 (5th Cir. 1980) (citation omitted), cert. denied, 451 U.S. 1017 (1981):

> "[it is not a court's task] to re-weigh the evidence or to draw [its] own inferences from the evidence before the Commission. [It] can ask only whether the Commission has observed the statutory limits that Congress has set for its discretion, whether its action was arbitrary or capricious, or whether its findings are supported by adequate analysis and substantial evidence in the record considered as a whole."

This formulation is in full accord with the standard for review of Commission decisions prescribed by this Court. See *Illinois Central R.R.* v. *Norfolk & W. Ry.*, 385

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[13]KCS is incorrect in its assertion (84-621 Pet. 19) that the concurring opinions should be disregarded because they were not introduced at a formal collective voting conference of the ICC. See, *e.g.*, *T.S.C. Motor Freight Lines, Inc.* v. *United States*, 186 F. Supp. 777, 785-786 (S.D. Tex. 1960), aff'd *sub. nom. Herrin Transp. Co.* v. *United States*, 366 U.S. 419 (1961).

Moreover, KCS's failure to raise this issue before the Commission precludes it from pressing the contention before this Court. See *Vermont Yankee Nuclear Power Co.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553-554 (1978); *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952).

U.S. 57, 66, 68-69 (1966); *Chicago, St. P., & O. Ry.* v. *United States*, 322 U.S. 1, 3 (1944); *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87-88 (1944).

Petitioner KCS's argument that the court of appeals applied an improper standard of review is nothing more than an effort (84-621 Pet. 19-24) to raise before this Court its factual arguments concerning the calculation of the public benefits of the consolidation, arguments that were rejected by both the Commission (Pet. App. 84a-105a, 561a-562a, 581a-582a) and the court of appeals (*id.* at 22a-24a). Review of this wholly factual issue is not warranted. See *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 310 (1974); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

The Commission's determination of the benefits of the consolidation was a prediction of uncertain events, and such " 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.' " *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978), quoting *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961). The court of appeals properly found (Pet. App. 23a-24a) that there was no merit in the challenges to the assumptions and methodology upon which the Commission's calculation of public benefits was based. It therefore properly upheld the Commission's determination that substantial benefits would result from the consolidation.[14] Further review of these factual issues is not warranted.

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[14]The pitfalls attending the recalculation of benefits urged by KCS are demonstrated by KCS's attempt to discredit the court of appeals' decision by reference to the $13.6 million reduction in car costs that all parties agree was appropriate (84-621 Pet. 23). A careful analysis of the Commission's finding regarding restatement of the applicants' car costs (Pet. App. 559a-560a) and of the Commission's adjustment of costs contained in Attachment C (Pet. App. 575a) shows that the $13.603

3. Petitioner KCS's principal argument (84-621 Pet. 9-16) is that the Commission should have granted KCS's request for trackage rights over a portion of the merged railroad in order to increase competition in certain markets, even though the consolidation did not adversely affect competition in those markets. The court below properly rejected this effort "to use the proposed consolidation as a springboard from which to launch a request for conditions having no connection with that consolidation" (Pet. App. 28a-29a).

KCS does not challenge the Commission's conclusion (Pet. App. 242a-244a; see also *id.* at 28a) that KCS's proposed conditions were not related to the competitive effect of the consolidation. It contends (84-621 Pet. 14-16) that both the Commission and the court of appeals erred by holding that the Commission need not consider conditions unless they are designed to ameliorate the anticompetitive effects of the consolidation under review (see Pet. App. 195a-196a, 28a-29a). The argument is based upon KCS's assertion (84-621 Pet. 12) that the Staggers Rail Act of 1980 (Staggers Act), Pub. L. No. 96-448, 94 Stat. 1895 *et seq.*, mandates the imposition of any condition that will increase

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million adjustment was made to reduce the applicants' estimate of a $25.014 million benefit from cars saved through improved utilization of existing cars. This was done by netting the value of equipment saved and the value of the additional equipment required to handle additional traffic, and applying the appropriate rate of return to that net figure. The figure that resulted, $11.411 million, was then deducted from the value of diverted traffic to reduce the value of that private benefit from the $40 million estimated by the Commission to $28.6 million, with a concomitant reduction in the overall benefits (but not the public benefits) of the merger. Compare Pet. App. 569a lines 1 and totals with Pet. App. 575a lines 1, 2(i) and totals. Thus, contrary to the contentions of KCS (84-621 Pet. 23), the Commission not only properly considered the $13.6 million reduction but also appropriately took account of the costs of additional equipment in computing the *private* benefits of the merger relating to diverted traffic.

competition. This contention is supported by neither the Act's language nor its legislative history.

The Interstate Commerce Act provides that "[t]he Commission shall approve [a merger] * * * when it finds the transaction consistent with the public interest" (49 U.S.C. 11344(c)). In making this determination, the Commission must consider the four factors set out in 49 U.S.C. 11344(b)(1) and the policies of the antitrust laws. *United States* v. *ICC*, 396 U.S. 491, 504 (1970).[15] The balancing of these factors is a matter for the Commission. *Penn-Central Merger Cases*, 389 U.S. 486, 498-499 (1968); *Illinois Central R.R.* v. *Norfolk & W. Ry.*, 385 U.S. at 68-69.

Section 11344(b) was amended by the Staggers Act to add a fifth factor to the Commission's consideration of proposed rail mergers — whether the transaction would have an adverse effect on competition among rail carriers in the affected region — which the Commission described simply as a "codification of [its] traditional approach to the evaluation of rail consolidations" (49 U.S.C. 11344(b)(1)(E); Pet. App. 78a). Petitioner KCS's suggestion (84-621 Pet. ~~84-621 Pet.~~ 12-16) that competition has been raised by the Staggers Act to be "the essential public-interest variable" (84-621 Pet. 12) is incorrect. The court of appeals properly rejected this assertion (Pet. App. 17a-18a), noting that:

> The increased emphasis on competition required by Congress modifies but does not basically alter the ICC's traditional approach, which has always considered the competitive impact of a proposed merger, but not to the exclusion of other factors. * * * * * The

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[15]The factors set out in the statute are: (1) the effect of the transaction on the adequacy of transportation; (2) the effect on the public interest of including other rail carriers in the area in the transaction; (3) the total fixed charges that would result from the transaction; and (4) the interest of employees. 49 U.S.C. 11344(b)(1)(A)-(D).

> Commission has always, and should continue, to perform a balancing test which takes a myriad of factors — including competition — into consideration * * *.

See also *United States* v. *ICC*, 396 U.S. at 513-514; *McLean Trucking Co.* v. *United States*, 321 U.S. at 87-88.[16]

Moreover, the Commission's refusal to consider conditions directed against anticompetitive effects unrelated to the consolidation actually furthers the procompetitive policy of the Staggers Act. The Commission determined that the use of its conditioning power "to make consolidation proceedings vehicles for rail system restructuring" was contrary to Congress' intent that private initiatives govern the structuring of the rail system (Pet. App. 196a-197a). This conclusion was approved by the court of appeals (*id.* at 28a). Since intrusion into the market by federal regulators is precisely what Congress was seeking to limit in enacting the Staggers Act (see 49 U.S.C. 10101a(1) and (2)), the Commission's approach is fully consistent with its statutory mandate.

In addition, expanding the scope of consolidation proceedings as suggested by KCS "would substantially increase their complexity * * * [and] increase the time required to decide these cases" (Pet. App. 197a). Such an increase in delay resulting from the regulatory process, and the possibility that a variety of unwarranted and burdensome conditions could be imposed on a railroad that sought approval of a merger, could discourage mergers that would be procompetitive and beneficial to the public and hinder the private restructuring of the rail industry that Congress sought to promote.

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[16]The court below held (Pet. App. 18a-22a) that the Commission gave full consideration to the competitive factors contained in the National Rail Transportation Policy, 49 U.S.C. 10101a, which was enacted as part of the Staggers Act.

In short, the Commission has exercised its authority to "determin[e] that * * * conditions imposed upon the consolidation had rendered that consolidation consistent with the public interest" (Pet. App. 28a). Since that determination was based upon the proper legal standard and was supported by the evidence, and since the Commission has "extraordinarily broad discretion to impose [such] protective conditions" (*id.* at 25a), further review of this question is not warranted.[17]

4. Petitioners BMWE et al. do not challenge the Commission's decision to impose conditions protecting the employees of the parties to the transaction. They assert (84-641 Pet. 15-20) that the statute directing the Commission to require protective provisions for employees "affected by the transaction" (49 U.S.C. 11347) also mandates the protection of the jobs of employees of railroads that are not parties to the consolidation if those employees' jobs might be affected by the consolidation.[18] The Commission did

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[17]Petitioner KCS's argument (84-621 Pet. 16 n.19) that the Commission's position with regard to this issue is an impermissible "rulemaking by adjudication" is wholly without merit. This Court has consistently held that an agency may formulate and apply policies in adjudications as long as the agency's action comports with fairness. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 292-294 (1974); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202-204 (1947). Here, the Commission did not apply a new policy to KCS' request for trackage rights. The policy in question was based upon the Commission's prior policy statement, *Railroad Consolidation Procedures*, 366 I.C.C. 75, 92 (1982), and had been applied previously, with the approval of the United States Court of Appeals for the Fifth Circuit, in *Burlington Northern, Inc.—Control & Merger—St. Louis (BN/Frisco)*, 360 I.C.C. 788, 950-952 (1980), aff'd *sub nom. Missouri-Kan.-Tex. R.R.* v. *United States*, 632 F.2d 392 (1980), cert. denied, 451 U.S. 1017 (1981). In that decision the Commission stated that conditions on a consolidation should not be used to ameliorate longstanding problems that are not related to the consolidation under review. See Pet. App. 195a-196a.

[18]These petitioners also argue (84-641 Pet. 11-15) that the Commission's consideration of "the interest of carrier employees affected by the transaction" (49 U.S.C. 11344(b)(1)(D)) must include the effect of

consider additional conditions to protect such employees (Pet. App. 277a-278a), but concluded that they were not required. The decisions of the Commission (*id.* at 278a-281a) and of the court below (*id.* at 34a)[19] that the Commission is not required to impose such conditions are consistent with the decisions of all of the courts of appeals that have considered the question. See *Lamoille Valley R.R.* v. *ICC*, 711 F.2d at 323-34; *Brotherhood of Maintenance of Way Employees* v. *ICC*, 698 F.2d 315, 316-318 (7th Cir. 1983); *Missouri-Kan.-Tex. R.R.* v. *United States*, 632 F.2d at 410-413; see also *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979).[20] In addition, the Commission consistently has interpreted 49 U.S.C. 11347 and its predecessor sections as requiring protection only for employees of

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the transaction upon all railroad employees, including employees of railroads that are not parties to the transaction. Since the Commission specifically considered the interests of persons employed by railroads other than the applicants (Pet. App. 60a, 225a, 271a-278a, 281a), this Court need not address this issue.

[19]The court of appeals (Pet. App. 34a) relied upon its prior decision in *Lamoille Valley R.R.* v. *ICC*, 711 F.2d at 323-324, in concluding that the Commission's interpretation of 49 U.S.C. 11347 was correct. The court in *Lamoille Valley R.R.* rested its decision on four points. First, it noted that the agency's reading of the statute was "sensible," because Section 11347 refers only to the rail carrier involved in the merger transaction and "its employees" (711 F.2d at 323). Second, the court noted that the legislative history of the statute supported the Commission's interpretation (*ibid.*). Third, the court found that the Commission's interpretation is "supported by considerations of practicality and administrative economy" (711 F.2d at 323-324), because it would be nearly impossible to rebut allegations that non-applicant carrier employees were adversely affected by a proposed merger. Finally, the court relied upon the agency's consistent interpretation of these sections of the Interstate Commerce Act (711 F.2d at 324).

[20]These decisions are in accord with the weight of district court authority prior to 1975 when Commission decisions were reviewed by three-judge district courts rather than by the courts of appeals. See *Florida East Coast Ry.* v. *United States*, 259 F. Supp. 993, 1019 (M.D.

the merging carriers. This longstanding administrative interpretation is entitled to substantial deference. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Accordingly, absent a conflict among the circuits, there is no warrant for further review by this Court on this point.

5. Petitioner Wheeler asserts that the Commission failed to discharge its obligation to ensure that the merger proposal is fair to minority shareholders (see *Schwabacher* v. *United States*, 334 U.S. 182, 198-201 (1948)). These arguments were properly rejected by the Commission (Pet. App. 298a-306a) and the court below (*id.* at 35a-38a).

Petitioner's principal contention (84-633 Pet. 6-12) is that the Commission failed to consider the value of WP's industrial land holdings, and therefore improperly rejected his challenge to the price offered to WP stockholders. Petitioner bases his argument upon the Commission's observation that land values are of little significance in determining the value of stock in an operating railroad (Pet. App. 302a),

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Fla. 1966), aff'd, 386 U.S. 544 (1967); *Railway Labor Executives' Ass'n* v. *United States*, 226 F. Supp. 521, 525 (E.D. Va.), vacated on other grounds, 379 U.S. 199 (1964).

Petitioners BMWE et al. rely on *Railway Labor Executives' Ass'n* v. *United States*, 216 F. Supp. 101 (E.D. Va. 1963), and the Commission's decision in *Pennsylvania R.R.—Merger*, 347 I.C.C. 536, 546 (1974). However, as two courts of appeals have noted, *Railway Labor Executives' Ass'n* rests on its own peculiar facts. *Lamoille Valley R.R.* v. *ICC*, 711 F.2d at 331; *Missouri-Kan.-Tex. R.R.* v. *United States*, 632 F.2d at 411 n.46. *Pennsylvania R.R.* involved the merger of subsidiaries of the same railroad (see 347 I.C.C. at 546), and therefore is inapposite because only employees of subsidiaries of the merging carriers —who therefore were employees of the applicants — were protected. See *Lamoille Valley R.R.* v. *ICC*, 711 F.2d at 324 n.60. *Soo Line R.R.* v. *United States*, 280 F. Supp. 907 (D. Minn. 1968), also relied on by petitioners (84-641 Pet. 16-18), does reach a contrary interpretation of the Interstate Commerce Act's employee protection section, but that aberrant decision has been rejected by the courts of appeals.

but that statement referred to the Commission's decision that the value of stock in a going concern such as a railroad "is to be measured by earnings power rather than * * * book value which may never be realized" (*id.* at 303a). Thus, the Commission did not find the land holdings irrelevant, it simply decided to account for those holdings indirectly, rather than directly, in the valuation process (see *id.* at 37a).

The Commission's decision to utilize a valuation method based upon the railroad's earning power (its "going concern" value) and not its book value is consistent with its prior decisions concerning this issue. See *Missouri Pac. R.R.—Securities*, 347 I.C.C. 377, 411 (1973); *Seaboard Air Line R.R.—Merger—Atlantic Coust Line*, 320 I.C.C. 122, 193 (1963); cf. *Consolidated Rock Co.* v. *Dubois*, 312 U.S. 510, 526 (1941). The record clearly indicates that the value of WP's land was reflected in the methodology used by the Commission to determine the stock's going concern value. As the court of appeals found (Pet. App. 37a), the hypothetical market price for the stock constructed by the Commission included the value of the land. This is because "in a free and actively traded [securities] market, absent compelling reasons to believe otherwise, the market price is held to take account of asset value as well as the other economic, political, and financial factors that determine 'value.' " *Seaboard World Airlines, Inc.* v. *Tiger International, Inc.*, 600 F.2d 355, 361-362 (2d Cir. 1979); see also *Mills* v. *Electric Auto-Lite Co.*, 552 F.2d 1239, 1245-1247 (7th Cir.), cert. denied, 434 U.S. 922 (1977).[21]

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[21]Petitioner Wheeler asserts (84-633 Pet. 8 n.3) that the Commission improperly relied upon stock market prices in ascertaining the railroad's going concern value. His claim that the Commission's prior decisions bar the use of this methodology is incorrect. As petitioner admits (*ibid.*), these decisions indicate that market prices are one appropriate measure of going concern value. See, *e.g.*, *Louisville &*

The value of WP's land holdings also was taken into account in setting the negotiated price of twenty dollars per share. As the Commission indicated (Pet. App. 301a), Salomon Brothers, the investment bankers retained to advise WP's Board of Directors, considered all elements of value in the WP enterprise, including book value and net asset value (*id.* at 298a-299a, 301a), in determining a fair price for the stock.[22] The Commission relied upon this negotiated price in approving the fairness of the transaction (*id.* at 306a). The court of appeals satisfied itself that

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N.R. Co.—Merger, 295 I.C.C. 457, 498 (1957). Moreover, even if the Commission did apply a slightly different test in this case, petitioner Wheeler has cited no authority to support his apparent view that the Commission cannot change the methodology used to ascertain going concern value. Cf. *American Trucking Ass'n* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967) (the Commission is "neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday"). The state law cited by Wheeler (84-633 Pet. 10-12) obviously does not bind the Commission (*Schwabacher* v. *United States*, 334 U.S. 182, 198 (1948)).

Wheeler's attempt (84-633 Pet. 8 n.3) to show that the stock's market price was an unreliable indicator of WP's earning power also is unavailing. His unsupported, improbable assertions that neither the financial community nor the WP Board of Directors (advised by an independent investment banking firm, Salomon Brothers) was aware of the value of the land holdings and that these holdings were not taken into consideration by UP in establishing its offer provide no basis for rejecting the market price approach. His conclusory statement (*ibid.*) that the market price was "depressed" also is insufficient to undercut the Commission's analysis.

[22]Petitioner Wheeler contradicts the record when he asserts (84-633 Pet. 3) that the negotiated twenty dollars per share figure was based solely on WP's "stand alone" value and did not reflect the current value of WP's real estate or the stock's increased value as a result of the merger (see Pet. App. 298a-301a). He contradicts himself when he telescopes the several months of negotiations (84-633 Pet. 3 ("fall of 1979 * * * January 18, 1980")) to "but one afternoon" (*id.* at 10 n.5).

there was substantial record evidence to support the Commission's conclusion that this price was arrived at as a result of arm's length negotiations between WP and UPC (*id.* at 37a). As the court of appeals noted (*id.* at 38a, quoting *United States* v. *ICC*, 396 U.S. at 520):

> "although the Commission in fulfilling its statutory responsibilities is to carefully review all of the terms of the merger proposal and determine whether they are just and reasonable, it is not for the agency, much less the courts, to dictate the terms of the merger agreement once this standard has been met."

Under this standard, there is no warrant for further review of this issue.[23]

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[23]Petitioner Wheeler's challenge (84-633 Pet. 13) to the Commission's "merger premium analysis" also is meritless. As the court of appeals found (Pet. App. 36a), the Commission properly considered the enhanced value of WP stock as a result of the merger. Petitioner Wheeler's claim is fatally flawed by his misunderstanding of the Commission's construction of the "premium." The Commission found that the present value of the stock's market value, including the "premium," was $38. However, this determination did not reflect the allocation of the benefits of the merger between the two parties to the merger (see Pet. App. 304a-305a). Allocation of these benefits reduced the stock's constructed value to a range of $16.25 to $26.25 (*id.* at 305a-306a). The $20 per share price offered to stockholders falls within this range, and therefore qualifies as fair and reasonable.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 84-621

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE KANSAS CITY SOUTHERN RAILWAY COMPANY
and
LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioners,
v.
THE UNITED STATES OF AMERICA
and
THE INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONERS THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND LOUISIANA & ARKANSAS RAILWAY COMPANY

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REPLY BRIEF OF PETITIONERS THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND LOUISIANA & ARKANSAS RAILWAY COMPANY

Petitioners The Kansas City Southern Railway Company and Louisiana & Arkansas Railway Company (collectively "KCS")[1] file this Reply Brief to address new

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[1] A list of all KCS' parent companies, subsidiaries (other than wholly owned subsidiaries) and affiliates as required by Supreme Court Rule 28.1 appears in KCS' Petition for Writ of Certiorari ("KCS Pet.") at iv-vi. Since the date of filing the Petition, KCS

arguments in the briefs of the Union Pacific Corporation, et al. ("UP")[2] and of the Interstate Commerce Commission and the United States of America (collectively the "Federal Respondents") opposing KCS' Petition for Writ of Certiorari in No. 84-621.

REPLY ARGUMENT

I. In its Petition for Writ of Certiorari, KCS argued that the policy of the Commission in rail merger proceedings so compromises the policy of Congress in the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified as amended in various sections of 49 U.S.C.), that this Court should grant review. Specifically, it is KCS' position that the shift from a century of close administrative regulation to marketplace competition for railroads requires the Commission to take the opportunity afforded by rail merger applications to introduce or augment competition in those cases where the public interest would be materially benefitted. The Commission ruled, however, and the Court of Appeals held, that the Com-

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has become affiliated with PVI, Inc., which has the following subsidiaries:

Bellview Pharmaceutical, Inc.
(previously listed as Bellview Pharmaceutical)
Rockhill Pharmaceutical, Inc.
(previously listed as Rockhill Pharmaceutical)
Olive Pharmaceutical, Inc.
(previously listed as Olive Pharmaceutical)
Stanton Pharmaceutical, Inc.
Spring Pharmaceutical, Inc.
Troost Pharmaceutical, Inc.
Linden Pharmaceutical, Inc.
Martec Pharmaceutical, Inc.
(new Delaware corporation)

The entity listed as Martec Pharmaceutical Inc., KCS Pet. at v, is a Missouri corporation, whose name has now been changed to Midwest Pharmaceutical, Inc.

[2] For rail parties, KCS will use those abbreviations set forth in KCS Pet. at ii.

mission need not even consider increasing competition beyond pre-merger levels, regardless of the public need for increased competition in areas served by the railroads proposing to merge. KCS submits that the Commission's rule cannot be reconciled with the Congressional injunction that competition "to the maximum extent possible" regulate the railroads. 49 U.S.C. § 10101a(1) (1982).

Rather than address the Commission's arbitrary anticompetitive rule, the Federal Respondents charge KCS with proposing an arbitrary procompetitive rule. They say that KCS would require "the imposition of *any* condition that will increase competition." Fed. Resp. Br. at 11-12 (emphasis added). The Federal Respondents have flatly misstated KCS' position. In the proceedings below, both KCS and the Commission understood the legal issue to be whether the Commission should impose procompetitive public interest conditions where there is a showing that: (1) serious anticompetitive circumstances exist which will stunt economic growth if not remedied; and (2) the proposed condition will not unduly burden the merger.[3] Thus, contrary to the contention of the Federal Respondents, the question is not whether the Commission must always accept procompetitive public-interest conditions, but whether it must always reject them.

In this proceeding, the public, acting through the Commission, has granted private railroads antitrust immunity in a deregulated industry enjoying virtually an absolute barrier to entry. KCS urged the Commission to exercise its conditioning power to require UP to accept

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[3] *See* KCS Pet. at 13, 14 (procompetitive public-interest conditions appropriate where "designed to eliminate market dominance" and where they do not "drain away the private benefits of a merger"); *accord* 366 I.C.C. 459, 563 (App. 194a):

> KCS asserts that we should impose conditions on mergers for the purpose of enhancing competition where adequate competition does not exist, if the conditions are feasible and not unduly burdensome on the merging carriers.

some increased competition as the consideration to the public for the enormous private benefits the public conferred on UP.[4] Instead, the Commission adopted a rule which permanently freezes rail competition at pre-merger levels. This Court should resolve the conflict between the Commission's arbitrary rule and Congress' advised procompetitive national rail policy which, insofar as increasing rail competition is concerned, can *only* be given effect in merger proceedings.[5]

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[4] Purportedly quoting KCS at oral argument before the Commission, UP argues that KCS acknowledged seeking conditions for "personal aggrandizement at the expense of [UP]." UP Br. at 4, *quoting* Transcript of ICC Oral Argument, at 180-81. Fully quoted, the transcript shows that KCS' counsel was describing *UP*'s characterization of KCS' position. It ill suits UP in any event to accuse KCS of seeking "personal aggrandizement at the expense of [others]". The Commission found that UP would take nearly $200 million in traffic away from other carriers, 366 I.C.C. at 801 (Attachment 2, total ICC staff estimate) (App. 592a), and made no findings as to over $200 million more that BN and CNW claimed UP would take from them. *Id.* (Attachment 2, second and third line items in protestant estimate). The test is the same, whether parties enjoy private gains from proposed mergers or from proposed merger conditions: are the proposals which create these private gains in the public interest? 49 U.S.C. § 11344(c) (Supp. IV 1980).

[5] The Federal Respondents argue that the Commission's position on procompetitive public-interest conditions is not a new policy, but is "based upon" Commission precedent, including Railroad Consolidation Procedures, 366 I.C.C. 75, 92 (1982), 49 C.F.R. § 1180.1 (1983). In its decision below, the Commission stated that, although it had previously considered conditions to protect "a competing *carrier*", 366 I.C.C. at 562 (App. 193a) (emphasis in original)—*i.e.* private-interest protective conditions—"[o]ur criteria for imposing conditions to protect the public have not been set forth in a similar comprehensive fashion". *Id.* (App. 194a).

The Federal Respondents also accuse KCS of arguing ("wholly without merit") that this rulemaking by adjudication is "impermissible". Fed. Resp. Br. at 14, n.17. KCS' Petition states, however, that rulemaking by adjudication, "*though not impermissible*, re-

II. As an additional ground for granting certiorari, KCS argued that the Court of Appeals' superficial "independent judgment" standard virtually abdicates judicial responsibility to review administrative decisions pursuant to the substantial evidence standard.[6] Because of its cursory review, the Court of Appeals had no idea how the Commission concluded that the merger offered $47 million in public benefits, and indeed selected its own components from among various dollar figures in the Commission's opinion to approximate $47 million. Such confusion by a court of appeals would be inconceivable under the substantial evidence test.

Silent about the Court of Appeals' failure to understand the source of the supposed $47 million in public benefits, the Federal Respondents focus instead on what KCS identified as the most serious arithmetic error committed by the Commission. As KCS pointed out, the Court of Appeals praised the Commission for recognizing a $13.6 million overstatement in equipment utilization. Because of the perfunctory nature of the "independent judgment" standard, however, the Court of Appeals failed to recognize that the Commission neglected to subtract from the $47 million in aggregate public benefits the very $13.6 million overstatement that the Commission itself had specifically held it was necessary to subtract. *See* KCS Pet. at 22-23.

The Federal Respondents' own discussion of this $13.6 million error confirms the dangers of the Court of Ap-

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quires scrutiny on review", KCS Pet. at 16, n. 19 (emphasis added), a standard not observed by the Court of Appeals.

[6] Misquoting KCS' brief below, UP labels KCS' argument concerning the "independent judgment" standard "disingenuous". UP would have this Court believe that KCS lured the Court of Appeals into the casual use of the phrase "independent judgment" so that KCS could seek review of that opinion in this Court. UP Br. at 10, n. 16.

peals' "independent judgment" standard. After a complex series of steps purporting to account for the $13.6 million, the Federal Respondents say that the Commission "[t]hus . . . appropriately took account of the costs of additional equipment in computing the *private* benefits of the merger". Fed. Resp. Br. at 10-11, n.14 (emphasis in original). Of course, even if the Federal Respondents' belated calculations correctly explain how the Commission adjusted UP's *private* benefits,[7] the Court of Appeals thought that it was reviewing a $13.6 million adjustment to *public* benefits.[8] An appellate court employing the substantial evidence test never would have let such a fundamental discrepancy go unexplained.

The Federal Respondents claim that KCS seeks review in this Court of a "wholly factual issue". Fed. Resp. Br. at 10. On the contrary, this Court is not being asked to parse out the extensive arithmetic computations of the Commission, but to declare that the "independent judgment" test applied by the Court of Appeals is not the appropriate standard of review. The issue, thus, is not whether this Court should review facts or second-guess findings, but whether the Commission will be allowed to mask the exercise of unreviewable discretion "in the haze of so-called expertise." *Baltimore & Ohio R. Co. v. Aberdeen & Rockfish R. Co.*, 393 U.S. 87, 92 (1968).

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[7] It is impossible to verify the Federal Respondents' present calculations from the Commission's decision. The Federal Respondents' explanation is nothing more than the *post hoc* rationalization of counsel, which must be rejected by a reviewing court. *See* Federal Power Commission v. Texaco Inc., 417 U.S. 380, 397 (1974); Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962).

[8] The short section of the Court of Appeals' opinion in which it congratulated the Commission for making the $13.6 million adjustment is entitled: "The public benefits". Slip Op. at 22, 736 F.2d 708, 719 (D.C. Cir. 1984) (App. 22a).

CONCLUSION

For the foregoing reasons and the reasons set forth in KCS' Petition for Writ of Certiorari, this Court should issue a writ of certiorari to the Court of Appeals for the District of Columbia Circuit.

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